No. 74-466

In the Supreme Court of the United States

OCTOBER TERM, 1974

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

PETER J. BRENNAN, SECRETARY OF LABOR, PETITIONER

v.

WALTER BACHOWSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Reasons for granting the writ	5
Conclusion	12
Appendix A	1A
Appendix B	21A
Appendix C	22A

CITATIONS

Cases:	
Altman v. *Wirtz*, *56 LRRM 2651*	6
Brennan v. *Silvergate District Lodge No. 50*, C.A. 9, No. 72-2657, decided September 13, 1974	6, 7
Calhoon v. *Harvey*, 379 U.S. 134	5, 7, 9
The Confiscation Cases, 7 Wall. 454	11
DeVito v. *Shultz*, 300 F. Supp. 381	6
Federal Trade Commission v. *Klesner*, 280 U.S. 19	11
Howard v. *Hodgson*, 490 F. 2d 1194	6
Katrinic v. *Wirtz*, 62 LRRM 2557	6
Linda R. S. v. *Richard D.*, 410 U.S. 614	11
McArthy v. *Wirtz*, 65 LRRM 2411	6
Morrissey v. *Shultz*, 74 LRRM 2679	6
Ravaschieri v. *Shultz*, 75 LRRM 2272	6
Schonfeld v. *Wirtz*, 258 F. Supp. 705	6
Trbovich v. *United Mine Workers*, 404 U.S. 528	5, 7, 8, 9
Vaca v. *Sipes*, 386 U.S. 171	11
Valenta v. *Brennan*, No. C74-11, N.D. Ohio, decided July 3, 1974	6
Wirtz v. *Local 30, Operating Engineers*, 54 LRRM 2577	6
Wirtz v. *Local 153, Glass Bottle Blowers Association*, 389 U.S. 463	7, 9, 12
Yick Wo v. *Hopkins*, 118 U.S. 356	8

559-255—74——1

Statutes:

	Page.
Administrative Procedure Act, 5 U.S.C. 551, *et seq.*:	
5 U.S.C. 701(a)	2, 3, 4
5 U.S.C. 701(a)(1)	3
5 U.S.C. 701(a)(2)	3, 4
5 U.S.C. 702	4
Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*:	
29 U.S.C. 401	12
29 U.S.C. 482 (Section 402)	2
29 U.S.C. 482(a)	2, 9
29 U.S.C. 482(b)	2, 4, 6, 7, 9
29 U.S.C. 483	7
5 U.S.C. 555(e)	4
28 U.S.C. 1337	5
28 U.S.C. 1361	8
Miscellaneous:	
S. Rep. No. 187, 86th Cong., 1st Sess.	7
Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851 (1960)	10
Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819 (1960)	10
Posner, *The Behavior of Administrative Agencies*, 1 J. Legal Studies 305 (1972)	10
Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 Harv. L. Rev. 367 (1968)	8

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v.

WALTER BACHOWSKI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–20A) is not yet reported. The order of the district court (App. B, *infra*, p. 21A) is unreported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 22A) was entered on July 26, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a disappointed union office seeker may invoke the judicial process to compel the Secretary of Labor to bring an action under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 to set aside a union election.

STATUTES INVOLVED

Section 402 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U.S.C. 482, provides in pertinent part:

> (a) A member of a labor organization * * * may file a complaint with the Secretary within one calendar month [after he has exhausted his intraunion remedies] alleging the violation of any provision of section 481 of this title * * *.
>
> (b) The Secretary shall investigate such complaint and, *if he finds* probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary * * * [emphasis added].

The Administrative Procedure Act, 5 U.S.C. 701 (a), provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

STATEMENT

Walter Bachowski was an unsuccessful candidate for the position of District Director of District 20, United Steelworkers of America. After exhausting his remedies within the union, he filed a complaint with the Secretary of Labor on June 21, 1973. Bachowski's was one of six complaints filed with the Secretary concerning the conduct of elections for District Directors in the Steelworkers union. Following investigation, the Secretary filed suit to set aside two of these elections.[1] The Secretary undertook an extensive investigation of Bachowski's complaint, twice asking for and receiving from the union extensions of time during which to continue the investigation.[2] The Secretary determined that no violations had occurred in the conduct of the election which could have affected its outcome. Accordingly, Bachowski was notified that the Secretary would not bring an action to set aside the election.

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[1] Districts 15 and 31.

[2] These facts are taken from Bachowski's complaint, from the opinion of the court of appeals, and from information made available to us by the Secretary of Labor. Because the district court dismissed Bachowski's complaint for want of "jurisdiction", all of the factual allegations in the complaint must be accepted as correct.

Bachowski thereupon instituted this suit against the Secretary and the union, seeking to compel the Secretary to file an action to set aside the election. The complaint alleged that some members voted in a manner in which the member voting could be identified with the choice expressed; that observers were denied to Bachowski at some polling places; that there were no elections in at least one local; and that the incumbent used dues money to aid in his reelection. The complaint also alleged that the Secretary's investigation had substantiated these charges.

On November 9, 1973, the day after the complaint was filed and before the Secretary had an opportunity to file a formal answer, the district court, after a short oral argument, dismissed the complaint for lack of "jurisdiction over the subject matter * * *" (App. B, *infra,* p. 21A).

The court of appeals reversed. The opinion began with a presumption of reviewability apparently drawn from 5 U.S.C. 702, subject only to the exceptions specified in 5 U.S.C. 701(a). Because the court of appeals concluded that the Secretary's decision not to challenge the union election was not "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2), it ordered the case remanded to the district court for a hearing[3] to determine whether the Secretary had abused his discretion by failing to file an

[3] The court of appeals also required the Secretary to furnish to Bachowski a statement of his reasons for not filing an action under 29 U.S.C. 482(b). We do not contest this portion of the court's holding. See 5 U.S.C. 555(e).

action to set aside the election.[4] The court of appeals rejected the government's argument that judicial intervention is foreclosed by the LMRDA except when the Secretary files suit, and that review of his decision not to file would hamper the administration of the statutory program. The court apparently thought it persuasive that if the Secretary "wrongfully refuses to file suit, individual union members are left without a remedy" (App. A, *infra,* p. 15A).

REASONS FOR GRANTING THE WRIT

We believe that the court of appeals has misconceived the limited power of judicial intervention into union internal affairs created by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). By permitting the courts to become involved in the decision whether or not to prosecute an action for a violation of the LMRDA, the court below has indirectly granted the private right of action specifically withheld by Congress. See *Calhoon* v. *Harvey,* 379 U.S. 134; *Trbovich* v. *United Mine Workers,* 404 U.S. 528. The decision, moreover, creates a conflict with two other circuits and impairs the Secretary's ability to administer efficiently this important statue.

[4] The court of appeals found jurisdiction pursuant to 28 U.S.C. 1337, which establishes jurisdiction without regard to the amount in controversy over proceedings "arising under any Act of Congress regulating commerce * * *" (see App. A, *infra,* pp. 3A–6A). We do not contest this holding. But of course that jurisdictional statute does not create any cause of action.

1. In *Howard* v. *Hodgson,* 490 F. 2d 1194, the Eighth Circuit held that courts cannot entertain an action for mandamus to compel the Secretary to institute an action under Section 482(b).[5] The plaintiff in *Howard* had complained that the Secretary had abused his discretion by determining that any violation of the LMRDA that may have occurred had not affected the outcome of the election. The court declined to pass on the claim of abuse, reasoning that only the Secretary had authority to make the initial determination; courts were to become involved only after the Secretary had commenced his action. The court below recognized that its holding was inconsistent with *Howard.* See App. A, *infra,* pp. 17A–19A, nn. 15, 16. It is also in conflict with *Brennan* v. *Silvergate District Lodge No. 50,* No. 72–2657 (C.A. 9, decided September 13, 1974), decided subsequently. The Ninth Circuit ruled in *Silvergate* that a union officeholder, ousted in the settlement of an election challenge filed by the Secretary, is not entitled to challenge the new election except by filing a complaint with the Secretary; because the "exclusive" remedy is

[5] The majority of district courts to consider the issue, whether in mandamus actions or ordinary suits, have concluded that they have no authority to compel the Secretary to bring an action. Compare *McArthy* v. *Wirtz,* 65 LRRM 2411 (E.D. Mo.); *Morrissey* v. *Shultz,* 74 LRRM 2679 (S.D.N.Y.); *Altman* v. *Wirtz,* 56 LRRM 2651 (D.D.C.); *Katrinic* v. *Wirtz,* 62 LRRM 2557 (D.D.C.); *Wirtz* v. *Local 30, Operating Engineers,* 54 LRRM 2577 (S.D.N.Y.); and *Ravaschieri* v. *Shultz,* 75 LRRM 2272 (S.D.N.Y.); with *Valenta* v. *Brennan,* No. C74–11 (N.D. Ohio, decided July 3, 1974); *DeVito* v. *Shultz,* 300 F. Supp. 381 (D.D.C.); and *Schonfeld* v. *Wirtz,* 258 F. Supp. 705 (S.D.N.Y.).

a suit by the Secretary, 29 U.S.C. 483, a dissatisfied office seeker cannot raise in court challenges "that were deemed unmeritorious by the Secretary." *Id.,* slip op. p. 11.

2. Congress established in the LMRDA a program permitting only limited interference in the internal affairs of unions.

> Congress weighed how best to legislate against revealed abuses * * * without departing needlessly from its long-standing policy against unnecessary governmental intrusion into internal union affairs.

Wirtz v. *Local 153, Glass Bottle Blowers Association,* 389 U.S. 463, 470–471 (footnote omitted). The legislative plan that emerged from the debates interposed the Secretary of Labor between the union and its disgruntled members. No suit can be brought except by the Secretary, 29 U.S.C. 482(b). The remedy provided by Section 482(b) is "exclusive", 29 U.S.C. 483. The possibility of permitting private suits against unions was considered and explicitly rejected. See *Calhoon* v. *Harvey, supra,* 379 U.S. at 140; S. Rep. No. 187, 86th Cong., 1st Sess., 21. Cf. *Bottle Blowers, supra,* 389 U.S. at 473. Indeed, this Court has also held that union members who intervene in suits already commenced by the Secretary may not raise new issues. *Trbovich* v. *United Mine Workers, supra.*

The type of action approved by the court below, although not as intrusive as the private suit rejected by *Calhoon,* is significantly more intrusive than the "new issue intervention" forbidden by *Trbovich.* If disgruntled union members may hale the union and

the Secretary into court and compel the Secretary to bring an action against the union, the union will have lost much of the protection Congress sought to provide. Unions will become subject to "frivolous litigation and unnecessary judicial interference with their elections," *Trbovich, supra,* 404 U.S. at 532. Although the Secretary and the union may eventually convince the district court that the Secretary did not abuse his discretion, the union will nevertheless be put to the task of defense and its election will be cast into doubt. This is the same result that would follow from an unlimited permission to bring private suits. In either case the union election presumably will stand when the complaint has no merit; the unnecessary interference arises because the union is put to a defense of its procedures at the whim of a member who may have no hope of success. The frivolity of a complaint usually does not leap from the pleadings, and the Federal Rules of Civil Procedure require hearings for all but the most specious complaints. In effect, if this decision stands, the courts will be burdened with the screening role that the Secretary was meant to play.[8]

[8] Cf. Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion"*, 82 Harv. L. Rev. 367 (1968). This is not to indicate that there are no circumstances that might permit judicial review of the Secretary's actions. Complete abdication of his duties might be an occasion for relief under 28 U.S.C. 1361. So, also, there might be justification for judicial intervention if the Secretary were alleged to be discriminating unconstitutionally. Cf. *Yick Wo* v. *Hopkins*, 118 U.S. 356. No such charge is levelled here.

3. The judicial review envisaged by the decision below will substantially disrupt the Secretary's administration of the LMRDA. Perhaps most importantly, the decision will upset the statutorily-created timetables for action. The union member's complaint must be filed within 30 days after he has exhausted his internal remedies, 29 U.S.C. 482(a). The Secretary is directed to file suit, if any, within sixty days thereafter, 29 U.S.C. 482(b). Such haste is imperative because union officials hold office for only a limited period of time; relief, to be effective, must be prompt. Moreover, it is important to remove as quickly as possible any cloud on the union office; the Secretary's decision not to file an action does so. However, if the union member is permitted to compel the Secretary to file, his suit against the Secretary and union will create a cloud on the office that cannot be resolved for some time, even though the member's suit eventually may be deemed frivolous. Should the district court require the Secretary to bring an action, this challenge would come long after the election and well beyond the sixty day limit. Thus, the congressional desire for prompt resolution of such challenges will have been frustrated. Cf. *Bottle Blowers, supra,* 389 U.S. at 468–469, n. 7.

Permitting the loser of the election to seek to compel suit will also impair the ability of the Secretary to settle disputes concerning union elections. It is clear from the legislative history that Congress believed settlement preferable to litigation, because it was both

swifter and less intrusive. See *Calhoon, supra,* 379 U.S. at 140. The Secretary's ability to settle, however, may often depend on his ability to promise the union that the bargain he strikes with it will be binding. Obviously, the Secretary can give no such assurance if he can be compelled, subsequently, to prosecute against his will.

Another important feature of the legislative program is centralized administration. Congress entrusted to the Secretary all decisions concerning how the Act would be carried out. *Trbovich, supra,* 404 U.S. at 532. Only if he maintains that control can the Secretary formulate and implement a rational and coordinated program of implementation of the Act. See Posner, *The Behavior of Administrative Agencies,* 1 J. Legal Studies 305 (1972). See generally Aaron, *The Labor-Management Reporting and Disclosure Act of 1959,* 73 Harv. L. Rev. 851 (1960); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 Mich. L. Rev. 819 (1960). If the disappointed union office seeker can compel prosecution, however, the administration of the Act will be spread throughout the district courts of the United States;[7] it will be difficult if not impossible for the Secretary to make coordinated policy choices concerning enforcement priorities.

[7] We also note that it is probably not an efficient use of scarce judicial resources to create two judicial hearings on a single violation of the LMRDA. The decision below would institute a "minihearing" on the merits—if the union member "won" the minihearing the court would compel the Secretary to prosecute. There would follow a full hearing on the merits—at which the union might well prevail.

4. Administrative agencies usually possess prosecutorial discretion comparable to that of a prosecutor of criminal laws. Compare *The Confiscation Cases,* 7 Wall. 454, with *Linda R. S.* v. *Richard D.,* 410 U.S. 614. In at least two analogous situations this Court has held that the decision of an administrative agency not to prosecute an alleged violation of the statute it administers is not judicially reviewable. *Vaca* v. *Sipes,* 386 U.S. 171, 182; *Federal Trade Commission* v. *Klesner,* 280 U.S. 19, 25. The court below, although acknowledging the authority of the prosecutorial discretion cases, attempted to distinguish them by arguing that in other cases the administrative agency was protecting the public weal, whereas the Secretary's action under the LMRDA is for the benefit of the aggrieved union member. This purported distinction is unpersuasive.

In *The Confiscation Cases* the Attorney General's suit to confiscate a vessel was unmistakably for the benefit of the informer, who collected one-half of the value of the vessel. Nevertheless, the Court held that the Attorney General was at liberty not to prosecute, and to dismiss a prosecution at will. *Vaca* v. *Sipes* upheld the power of the General Counsel of the NLRB not to prosecute, even though an employee, if vindicated in an unfair labor practice proceeding, may collect substantial back pay remedies. Indeed, in those cases the complainant had a more immediate stake in the outcome of the suit. Here, the plaintiff at most can hope that the old election will be annulled and a new election conducted, at which he will have an opportu-

nity to run but no guarantee of success. The policy of the LMDRA, as expressed in its preamble, 29 U.S.C. 401, is not to bestow a boon on individual office seekers but to vindicate the interest of the public at large in labor peace, and of the union membership at large in union democracy. See *Bottle Blowers, supra,* 389 U.S. at 475. It therefore follows that the Secretary, like the General Counsel of the NLRB, should be entitled to the usual scope of prosecutorial discretion.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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OCTOBER 1974.

APPENDIX A

United States Court of Appeals for the Third Circuit

No. 73–2029

WALTER BACHOWSKI, APPELLANT
v.
PETER BRENNAN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR
AND
UNITED STEELWORKERS OF AMERICA

(D.C. Civil No. 73–954)

Appeal from the United States District Court for the Western District of Pennsylvania

Argued May 14, 1974

Before: SEITZ, *Chief Judge,* and VAN DUSEN and GIBBONS, *Circuit Judges*

Joseph L. Rauh, Esq., Washington, D.C., *Kenneth J. Yablonski,* Esq., Washington, Pa., Attorneys for Appellant.

Irving Jaffe, Acting Assistant Attorney General; *Richard L. Thornburgh,* United States Attorney; *Stephen F. Eilperin,* Esq. and *Michael H. Stein,* Esq., Attorneys, U.S. Department of Justice, Attorneys for the Secretary of Labor.

Michael H. Gottesman, Esq., Washington, D.C.; *James English,* Esq., Pittsburgh, Pa.; *Bernard Kleiman,* Esq. (of counsel), Chicago, Ill., Attorneys for United Steelworkers of America.

Opinion of the Court
(Filed July 26, 1974)
(As Amended September 3, 1974)

VAN DUSEN, *Circuit Judge.*

This case is an appeal from the district court's dismissal for lack of subject matter jurisdiction of a suit to compel the Secretary of Labor (the "Secretary") to bring an action to upset a union election under § 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 ("L-MRDA"), 29 U.S.C. § 482(b).[1] The issue presented is whether the Secretary's decision not to bring such an action is subject to judicial review.

Plaintiff Walter Bachowski was a candidate for the office of District Director of District 20 of the United Steelworkers of America (the "USWA") in an election held on February 13, 1973. He was defeated in that election by 907 votes of approximately 24,000 votes cast. After exhausting his administrative remedies within the union, Bachowski filed a complaint with the Department of Labor on June 21, 1973, alleging numerous election irregularities and violations of the union constitution and § 401 of the L-MRDA, 29 U.S.C. § 481. Following an investigation of this complaint, the Secretary notified Bachowski and the union that he had decided not to bring an action to set aside the contested election. Bachowski thereupon brought the present lawsuit, naming as defendants the Secretary and the union. The complaint alleges, *inter alia,* that the Secretary's investigation had substantiated the enumerated charges of election irregularities and that these irregularities affected the outcome of the election, but that the Secreary nevertheless refused to file a suit to set aside the election and failed even to inform Bachowski of his reasons for that refusal. The complaint concludes that these actions by the Secretary were arbitrary and capricious and requests that the district court direct the Secretary (1) to make available to the plaintiff all evidence he has obtained concerning his investigation of the contested election, (2) to reach an agreement with the union extending the period of time for filing suit to set aside that election, and (3) to file such suit.

[1] "(b) The Secretary shall investigate such compliant and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary and in accordance with the provisions of this subchapter and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization."

I.

The only jurisdictional allegations contained in the complaints are § 402 of the L-MRDA and § 10(a) of the Administrative Procedure Act (the "APA"), 5 U.S.C. § 702. This court has repeatedly held that the APA does not confer jurisdiction upon federal courts over cases not otherwise within their competence, *Richardson* v. *United States,* 465 F. 2d 844, 849 n. 2 (3d Cir. 1972) (en banc), *cert. denied,* 410 U.S. 955 (1973); *Zimmerman* v. *United States Government,* 422 F. 2d 326, 330–31 (3d Cir.), *cert. denied,* 399

U.S. 911 (1970); *Operating Engineers Local 542* v. *N.L.R.B.*, 328 F. 2d 850, 854 (3d Cir. 1964). In addition, § 402 of the L-MRDA confers federal jurisdiction only over actions brought by the Secretary to challenge the conduct of a union election, 29 U.S.C. § 482(b). However, although not specifically alleged in the complaint,[2] we believe that 28 U.S.C. § 1337 provides a basis for federal jurisdiction in this case.[3] The L-MRDA is an "Act of Congress regulating commerce" within the meaning of § 1337, see § 2(c) of the L-MRDA, 29 U.S.C. § 401(c), and we believe that the instant case "arises under" that Act. Plaintiff's claim is founded directly on the L-MRDA in that he asserts a right, supported by his construction of § 402, to have the Secretary file a suit on his behalf to set aside the contested election where the evidence shows that violations occurred which affected its outcome and where the Secretary has not come forward with any valid reason for refusing to do so. *Gully* v. *First National*

[2] In pleading that this action is brought "under" § 402 of the L-MRDA, plaintiff may have intended to allege jurisdiction founded on the existence of a question "arising under" that statute. *Cf.* 2A Moore's Federal Practice ¶8.9[2] at 1652 and F.R. Civ. P. Official Form 2(c). In any case, the failure of the complaint specifically to cite 28 U.S.C. § 1337 does not prevent this court from considering it as a basis for jurisdiction, for, under the facts of this case, "[i]t is not necessary to name the statutory section if in fact a complaint states a cause of action under it." *Copra* v. *Suro*, 236 F. 2d 107, 114 (1st Cir. 1956).

[3] Section 1337 provides:

"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

The tests required by § 1337 are the same as those demanded by § 1331, except that no jurisdictional amount need be alleged. See *Peyton* v. *Railway Express Agency*, 316 U.S. 350 (1942); 1 Moore's Federal Practice ¶0.60[8.-3] at 627.

Bank, 299 U.S. 109, 112 (1936); *Starin* v. *New York*, 115 U.S. 248, 257 (1885). In a closely analogous case, we held that a suit by the business agent of a union local for injunctive relief and declaratory judgment that he was not barred by 29 U.S.C. § 504 from continuing in office was a case "arising under" the L-MRDA and that, therefore, there existed federal question jurisdiction pursuant to 28 U.S.C. § 1337. *Serio* v. *Liss*, 300 F. 2d 386, 387–88 (3d Cir. 1961).[4]

[4] It is possible that federal jurisdiction in this case also exists under 28 U.S.C. § 1361, since the complaint may be read to allege that the Secretary has acted contrary to law. See *Howard* v. *Hodgson*, 490 F. 2d 1194, 1195 (8th Cir. 1974); Wright & Miller, Federal Practice and Procedure § 1350, n. 54 (1969). In view of our holding below as to plaintiff's right to the remedy of judicial review under the APA, however, it is not necessary to decide whether the complaint also states a claim for which mandamus relief can be granted, for the scope of judicial review under the APA seems clearly broader than that available upon a petition for mandamus. As we held in *Richardson* v. *United States*, 465 F. 2d 844, 849 (3d Cir. 1972) (en banc), cert. denied, 410 U.S. 955 (1973):

"In order for mandamus to issue, a plaintiff must allege that an officer of the Government owes him a legal duty which a specific, plain ministerial act 'devoid of the exercise of judgment or discretion.' * * *. An act is ministerial only when its performance is positively commanded and so plainly prescribed as to be free from doubt."

Thus, while a petition would issue to order the Secretary to file suit to set aside an election where his own investigation revealed violations affecting the outcome, mandamus relief would not be available to question whether the findings and conclusions of such an investigation were arbitrary and capricious and an abuse and discretion. See the discussion of *Howard* v. *Hodgson*, *supra*, at notes 13 and 16 below. But see *Peoples* v. *United States Department of Agriculture*, 427 F. 2d 561, 565 (D.C. Cir. 1970) (Mandamus may issue to correct abuse of discretion).

Our conclusion that the district court had federal question jurisdiction to entertain this case, however, does not resolve what is the underlying issue in this case: whether the Secretary's decision not to bring suit to upset a union election under § 402 of the L-MRDA is subject to judicial review. Although the district court's dismissal was technically for lack of subject matter jurisdiction, the record reveals that its action was based on a determination that such a decision by the Secretary is not reviewable.[5] Thus, in the interest of judicial economy, it is necessary to reach this issue on this appeal and decide, in effect, if plaintiff Bachowski has stated a claim upon which relief can be granted.

II.

Plaintiff seems to be entitled to judicial review under the APA, 5 U.S.C. § 702, unless the Secretary's decision not to bring suit to set aside the election is excluded from the coverage of the APA by § 701(a),[6] which provides:

[5] There was no opinion accompanying the district court's order granting defendants' motion for dismissal, but at the conclusion of the November 8, 1973, hearing, after extensive discussion of the question of reviewability, the court concluded that it lacked "authority" to find that the Secretary's actions were arbitrary and capricious and to order him to file suit. See Doc. 9 at p. 27 (W.D. Pa., Civil No. 73-0954).

[6] The Secretary argues that § 606 of the L-MRDA, 29 U.S.C. § 526, which governs the applicability of the APA to actions taken pursuant to the L-MRDA, does not provide plaintiff here a basis for judicial review, since the Secretary's determination not to bring suit is not an "adjudication." Whatever the merit of this contention (see the definition of "adjudication" in 5 U.S.C. § 551(7)), it has no bearing on plaintiff's claim for relief because the APA subjects to judicial review not only "[a]gency action made reviewable by statute," but also "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704.

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

The burden of establishing such exclusion, however, is on the defendants. See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140–41 (1967). As the Second Circuit has noted:

> Absent any evidence to the contrary, Congress may rather be presumed to have intended that the courts should fulfill their traditional role of defining and maintaining the proper bounds of administrative discretion and safeguarding the rights of the individual.

Cappadora v. *Celebrezze*, 356 F. 2d 1, 6 (2d Cir. 1966). With this construction in mind, we turn to an examination of the purpose behind the enforcement procedure set forth in Title IV of the L-MRDA and the nature of the discretion exercised by the Secretary pursuant to that procedure in order to determine if the Secretary's action in this case is reviewable.

A

Defendants contend that Congress' intent to preclude judicial review and to commit to the Secretary's absolute discretion the decision whether to bring suit can be inferred from two features of the L-MRDA: (1) the Secretary has exclusive authority to sue to set aside a union election, and (2) he must exercise that authority within 60 days of the filing of a complaint. After careful consideration of defendants' arguments and the cases cited in support thereof, we do not find that there exists the necessary "clear and convincing evidence" of a legislative intent to restrict judicial review. See *Citizens To Preserve Overton Park, Inc.*

v. *Volpe,* 401 U.S. 402, 410 (1971); *Abbott Laboratories* v. *Gardner, supra* at 141.

Section 403 of the L-MRDA 29 U.S.C. § 483, makes suit by the Secretary the "exclusive" post-election remedy for violations of Title IV of the Act, and the Supreme Court held in *Calhoon* v. *Harvey,* 379 U.S. 134, 140 (1964), that union members are thereby prohibited from initiating a private suit to set aside an election. In *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 532 (1974), the Court described the purpose behind this procedure as follows:

> A review of the legislative history shows that Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election. Title IV as enacted serves these purposes by referring all complaints to the Secretary so that he can screen out frivolous ones, and by consolidating all meritorious complaints in a single proceeding, the Secretary's suit in federal district court.

In light of these purposes, the Court went on to hold in *Trbovich* that Congress did not intend to prevent a union from intervening in a suit brought by the Secretary, but that such intervening union was not entitled to raise additional grounds for setting aside the election, not contained in the Secretary's complaint, since that would circumvent the Secretary's screening function. *Id.* at 536–37.[7]

[7] We recognize that in reaching this conclusion, the Supreme Court employed some broad and unqualified language concerning the intent of Congress in assigning this screening function to the Secretary:

"With respect to litigation by union members, then, the legislative history supports the conclusion that Congress intended to prevent members from pressing claims *not thought meritorious by the Secretary*, and from litigating in forums or at times different from those chosen by the Secretary." *Id.* at 536 (emphasis added).

"[W]e think Congress intended to insulate the union from any complaint that *did not appear meritorious to* both a complaining member and *the Secretary.*" *Id.* at 537 (emphasis added).

However, we do not believe that the Court intended to imply by that language that the Secretary's decision was unreviewable, for that issue was not presented in *Trbovich.* Rather, the above-quoted statements must be read in the context of the Court's holding that an intervening union would not be permitted to circumvent the screening function assigned to the Secretary by raising additional claims which he had not had an opportunity to evaluate or had already rejected.

Applying this reasoning to the instant case, we do not believe that a limited judicial review of the Secretary's decision not to bring suit would in any way conflict with the purposes behind the Secretary's screening function. Unions would not be subjected to unnecessary judicial interference with their elections, since under the "arbitrary and capricious" standard of review, a court would overturn the Secretary's judgment only where there is compelling evidence that he has ignored a meritorious complaint. See 5 U.S.C. § 706(2)(A) and *Citizens To Preserve Overton Park, Inc.* v. *Volpe, supra* at 416. Furthermore, unions would remain protected from harassment or the burden of frivolous litigation, since the primary responsibility for defending suits such as this one would lie with the Secretary.[8] Finally, in those rare instances when a

[8] The USWA contends that another legislative concern in enacting Title IV was to avoid "unnecessary expenditure of the limited resources of the Secretary of Labor," *Hodgson* v. *Steelworkers Local 6799,* 403 U.S. 333, 339 (1971), and that this objective will be frustrated if the Secretary can be required to defend his decisions not to bring suit. We do not consider this argument sufficiently persuasive to support a holding of nonre-

challenge to the Secretary's decision not to bring suit is successful, the subsequent litigation would still be centralized in a single proceeding. We therefore conclude that in making a suit by the Secretary the exclusive post-election remedy, Congress did not intend to make the Secretary's decision not to bring suit unreviewable. On the contrary, we believe judicial review would further the general policy of Title IV of the L-MRDA by ensuring that the Secretary does not deny a remedy to those whose rights Congress sought to protect. As one court has observed:

> Indeed the very exclusivity of the remedy serves to emphasize the necessity of some degree of Court supervision. To rule otherwise would enable the Secretary to frustrate the will of Congress; it would leave the Secretary's conduct immune from scrutiny in matters where he is charged with significant responsibilities that must be carried out if the sweeping congressional directive to infuse basic principles of democratic free election into union organizations is to be implemented.

DeVito v. *Shultz*, 300 F. Supp. 381, 382 (S.D. N.Y. 1969).

Nor do we find sufficient evidence of a congressional intent to restrict judicial review in the requirement of § 402(b) that the Secretary file suit within 60 days after the filing of a complaint. We realize that, if

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viewability on the facts of this case. In the first place, Congress' "concern" with husbanding the Secretary's resoures was mentioned in *Hodgson* merely as a secondary reason for requiring an individual to exhaust his union remedies before filing a complaint with the Secretary. Moreover, the expense to an agency of defending its decisions can hardly be considered a valid reason for restricting judicial review. Finally, the Secretary could help to discourage frivolous suits against him and thus avoid unnecessary expenditures by providing in each case an adequate statement of his reasons for not bringing suit.

permitted, a challenge to the Secretary's decision not to bring suit may in some cases result in a court ordering the Secretary to file suit long after this time limit, thereby conflicting with Congress' concern to assure that the cloud on the incumbents' titles to office will be resolved as quickly as possible, *Wirtz* v. *Bottle Blowers Ass'n*, 389 U.S. 463, 468–69, n. 7 (1968). That concern, however, may be subordinated to the goal of providing an effective remedy for election irregularities. Thus, the Secretary has been allowed to file suit beyond the 60-day period not only in those cases where the union has waived the requirement to permit additional investigations or settlement negotiations, *Hodgson* v. *Machinists Lodge 851*, 454 F. 2d 545 (7th Cir. 1971); *Hodgson* v. *International Pressmen*, 440 F. 2d 113 (6th Cir.), *cert. denied*, 404 U.S. 828 (1971), but also where the union has by its conduct impeded the Secretary's investigations, *Wirtz* v. *Carpenters Local 1622*, 285 F. Supp. 455 (N.D. Cal. 1968); *Wirtz* v. *Independent Workers Union*, 65 L.R.R.M. 2104, 2108 (M.D. Fla. 1967); *Wirtz* v. *Great Lakes District Local 47*, 240 F. Supp. 859 (N.D. Ohio 1965). Although here it is the alleged wrongdoing of the Secretary, rather than the union, which has caused the delay, we believe a court would be acting consistently with the fundamental purpose of the L-MRDA in entertaining a suit beyond the time limit in those rare cases where the Secretary's original decision not to file suit has been successfully challenged.

In concluding that the procedures set forth in §§ 402 and 403 do not evince a congressional intent to preclude judicial review of the Secretary's decision whether to bring suit, we do not mean to deny that the Secretary has considerable discretion in the exercise of his enforcement powers. Speaking of the Secre-

tary's duty to screen complaints before filing suit, the Court stated in *Calhoon* v. *Harvey, supra.* at 140:

> It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest. . . . Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies, and where that fails, to utilize the agencies of the Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts.

However, the fact that an agency action involves some discretion does not necessarily make it unreviewable. See *Ferry* v. *Udall,* 336 F. 2d 706, 711 (9th Cir. 1964). Rather,

> [t]he question is whether the Secretary * * * enjoys absolute discretion—whether such a decision is totally committed to the judgment of the agency because of the practical requirements of the task to be performed, absence of available standards against which to measure the administrative action, or even the fact that no useful purpose could be served by judicial review.

Cappadora v. *Celebrezze, supra.* at 5–6.

The Secretary contends that his decision whether to bring suit under § 402 of the LMDRA is an exercise of prosecutorial discretion which is unreviewable and cannot be compelled by a court. See *Confiscation Cases,* 74 U.S. (7 Wall.) 454 (1869); *Inmates of Attica Correctional Facility* v. *Rockefeller,* 477 F. 2d 375 (2d Cir. 1973); *Peek* v. *Mitchell,* 419 F. 2d 575 (6th Cir. 1970); *Spillman* v. *United States,* 413 F. 2d 527 (9th Cir.), *cert. denied,* 396 U.S. 930 (1969); *Smith* v. *United States,* 375 F. 2d 243 (5th Cir.), *cert. denied,* 389 U.S. 841 (1967); *Powell* v. *Katzenbach,*

359 F. 2d 234 (D.C. Cir. 1965), *cert. denied,* 384 U.S. 906 (1966). Not every refusal by a Government official to take action to enforce a statute, however, is unreviewable. See *Adams* v. *Richardson,* 480 F. 2d 1159 (D.C. Cir. 1973). *Cf. Camp* v. *Pitts,* 411 U.S. 138 (1973). Although the Secretary's decision to bring suit bears some similarity to the decision to commence a criminal prosecution, the principle of absolute prosecutorial discretion is not applicable to the facts of this case.

To begin with, we believe that the doctrine of prosecutorial discretion should be limited to those civil cases which, like criminal prosecutions, involve the vindication of societal or governmental interests, rather than the protection of individual rights. The *Confiscation Cases, supra,* on which the Secretary primarily relies,[9] were suits to confiscate property used in aid of rebellion; there was little question that they were "for the benefit of the United States," *id.* at 457, rather than on behalf of any aggrieved individuals. However, the legislative history of the LMDRA demonstrates a deep concern with the interest of individual union members, as well as the gen-

[9] The Secretary also cites *Georgia* v. *Mitchell,* 450 F. 2d 1317, 1321 (D.C. Cir. 1971), for the proposition that the principles regarding prosecutorial discretion enunciated in criminal cases are applicable to the exercise of prosecutorial discretion in a civil context. However, the doctrine applied there was not that the discretion of the Attorney General and the Secretary of HEW is absolute, but only that judicial review of their discretionary conduct is narrowly restricted. Since the court found that the prosecution of *de jure* segregation in Georgia without challenging *de facto* segregation elsewhere did not constitute selective or discriminatory enforcement of school desegregation, it held that the case then before the court was inappropriate for judicial review.

eral public, in the integrity of union elections.[10] Thus, in seeking to remedy violations of the Act, the Secretary acts not only for the benefit of the country as a whole, but also on behalf of those individuals whose rights have been infringed.[11] To grant the Secretary

[10] "It needs no argument to demonstrate the importance of free and democratic union elections. Under the National Labor Relations and Railway Labor Acts the union which is the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours, and conditions of employment. The individual employee may not lawfully negotiate with his employer. He is bound by the union contract. In practice, the union also has a significant role in enforcing the grievance procedure where a man's contract rights are enforced. The Government which gives unions this power has an obligation to insure that the officials who wield it are responsive to the desires of the men and women whom they represent. The best assurance which can be given is a legal guaranty of free and periodic elections. The responsiveness of union officers to the will of the members depends upon the frequency of elections, and an honest count of the ballots. Guaranties of fairness will preserve the confidence of the public and the members in the integrity of union elections."

S. Rep. No. 187, 86th Cong., 1st Sess. (1959), quoted at p. 2336, U.S. Code Cong. & Admin. News. The Supreme Court has summarized this purpose as follows:

"The LMRDA was the first major attempt of Congress to regulate the internal affairs of labor unions. Having conferred substantial power on labor organizations, Congress began to be concerned about the danger that union leaders would abuse that power, to the detriment of the rank-and-file members. Congress saw the principle of union democracy as one of the most important safeguards against such abuse, and accordingly included in the LMRDA a comprehensive scheme for the regulations of union elections."

Trbovich v. *United Mine Workers*, *supra* at 530–31.

[11] This case is, therefore, distinguishable from *Vaca* v. *Sipes*, 386 U.S. 171, 182–83 n. 8 (1967), where the Court held that the General Counsel of the National Labor Relations Board has unreviewable discretion to refuse to institute an unfair labor

absolute discretion in this situation seems particularly inappropriate, for if he wrongfully refuses to file suit, individual union members are left without a remedy.

Furthermore, as Professor Davis has observed, perhaps the most convincing reason for the unreviewability of prosecutorial discretion is that a prosecutor "may be actuated by many considerations that are beyond the judicial capacity to supervise." Davis, Administrative Law Treatise, § 28.16 at 984 (1970 Supp.). The factors to be considered by the Secretary, however, are more limited and clearly defined: § 482 (b) of the L-MRDA provides that after investigating a complaint, he must determine whether there is probable cause to believe that violations of § 481 have occurred affecting the outcome of the election.[12] Where a complaint is meritorious and no settlement has been reached which would remedy the violations found to exist, the language and purpose of § 402(b) indicate that Congress intended the Secretary to file suit.[13]

practice complaint because, under § 10(c) of the National Labor Relations Act, "[t]he public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies."

[12] Despite its literal language, § 402(b) does not require the Secretary to bring an action whenever he finds a violation that has not been remedied, but rather confers discretion upon him also to determine whether there is probable cause to believe that such violation affected the outcome of the election. *Wirtz* v. *Bottle Blowers Ass'n*, *supra* at 472; *Howard* v. *Hodgson*, *supra*; *Ravaschieri* v. *Shultz*, 75 L.R.R.M. 2272 (S.D. N.Y. 1970); *Schonfeld* v. *Wirtz*, 258 F. Supp. 705, 708 (S.D. N.Y. 1966); S. Rep. No. 187, 86th Cong., 1st Sess. (1959), quoted at p. 2337, U.S. Code Cong. & Admin. News.

[13] After holding that the Secretary had discretion not to file suit where he has determined that there is not probable cause to believe that such violations as occurred affected the outcome

Thus, apart from the possibility of settlement, the Secretary's decision whether to bring suit depends on a rather straightforward factual determination, and we see nothing in the nature of that task that places the Secretary's decision "beyond the judicial capacity to supervise." See p. 13, *supra*.

Nevertheless, the question remains as to what the proper scope of such judicial review should be. In *DeVito* v. *Schultz*, *supra* at 384, the court held that "the Secretary must provide those who petitioned for his intervention with an adequate written statement of his reasons for nonintervention." Since the letter explaining the Secretary's decision not to bring suit conceded that serious irregularities had occurred but failed to mention the Secretary's conclusion as to the effect of those irregularities on the outcome of the election, the court in *DeVito* ordered the Secretary to reconsider his decision, and if after reconsideration he was still determined not to act, the court held that the individual complainant is entitled to a fuller statement of reasons. We have found no case which questions this requirement. Indeed, in *Ravaschieri* v. *Shultz*, *supra* at 2274, although the court concluded that it had no jurisdiction to review the Secretary's refusal to bring suit, it stressed the importance of the fact that he had made known the reasons for that decision. In addition, "a brief statement of the grounds for denial" is required by the APA, 5 U.S.C.

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of the election, the court in *Howard* v. *Hodgson*, *supra* at 1197, went on to state:

"This is not to say that the Secretary's discretion under § 482 is absolute. If the Secretary finds probable cause to believe that a violation has occurred and also finds probable cause to believe that the violation may have affected the outcome of the election, the Act requires that he commence an action against the labor organization."

§ 555(e), and as Professor Davis has pointed out, the practical reasons for requiring findings are as applicable to informal agency action as to action based on formal hearings. Davis, Administrative Law Treatise § 16.00 at 559 (1970 Supp.).[14] Thus, judicial review of the Secretary's decision not to bring suit should extend at the very least to an inquiry into his reasons for that decision to ensure that he has not abused the discretion granted him by the LMDRA.

The relief requested by the complaint in the instant case, however, goes beyond such an inquiry. Anticipating the Secretary's reasons, plaintiff seeks an opportunity to challenge the factual basis for his conclusion either that no violations occurred or that they did not affect the outcome of the election. Only one court has held that it had the power to review this exercise of the Secretary's discretion. *Schonfeld* v. *Wirtz*, *supra* at 708–09.[15] The majority of courts con-

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[14] Two of these reasons are clearly applicable to the instant case: facilitating judicial review and assuring careful administrative consideration. The latter would be relevant even if the Secretary's decision were unreviewable. See *Johnson* v. *Chairman of New York Board of Parole*, No. 73–2581 (2d Cir., June 13, 1974), 43 L.W. 2011. In cases where agency action *is* subject to judicial review, this court has repeatedly held that an adequate statement of reasons is necessary for courts to perform their function properly. See *United States* v. *Ziskowski*, 465 F. 2d 480 (3d Cir. 1972); *United States* v. *Neamand*, 452 F. 2d 25 (3d Cir. 1971); *Scott* v. *Commanding Officer*, 431 F. 2d 1132 (3d Cir. 1970). *Cf. Dry Color Mfrs. Ass'n* v. *Department of Labor*, 486 F. 2d 98, 105–06 (3d Cir. 1973). Since the Supreme Court's decision in *SEC* v. *Chenery Corp.*, 318 U.S. 80, 94 (1943), this principle has been followed by other courts in a wide variety of contexts. See generally Davis, Administrative Law Treatise § 16.05 (1958 ed. & 1970 Supp.).

[15] See also *Brennan* v. *Connecticut State UAW, Community Action Program Council*, Civ. No. B–743 (D. Conn., Apr. 24, 1974), where the court cited both *Schonfeld* v. *Wirtz*, *supra*,

sidering the matter have refused to conduct such a review. *Howard* v. *Hodgson, supra; Orphan* v. *Hodgson,* 78 L.R.R.M. 2825 (N.D. Ill. 1971); *Ravaschieri* v. *Shultz, supra; McArthy* v. *Wirtz,* 65 L.R.R.M. 2411 (E.D. Mo. 1967); *Katrinic* v. *Wirtz,* 62 L.R.R.M. 2557 (D. D.C. 1966); *Altman* v. *Wirtz,* 56 L.R.R.M. 2651 (D. D.C. 1964). Insofar as these cases stand for the propostion that the Secretary's determination of the merit of a complaint is completley unreviewable,[16] we

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and *DeVito* v. *Shultz, supra*, with approval in holding that the views of intervening union members could not be disregarded just because the union stipulated to a remedy without conceding any violations.

In *Schonfeld* the Secretary's investigation revealed that violations of the L-MRDA had occurred, and its holding could therefore be limited to permit review only of the Secretary's determination that there is not probable cause to believe that such violations affected the outcome of the election. See *McArthy* v. *Wirtz*, 65 L.R.R.M. 2411, 2413 (E.D. Mo. 1967). However, we believe that there is no meaningful distinction between the finding as to the existence of a violation and the finding as to its effect on the election. We note that this distinction was explicitly rejected in *Howard* v. *Hodgson*, 83 L.R.R.M. 3023, 3025 (E.D. Mo. 1973), *aff'd*, 490 F. 2d 1194 (8th Cir. 1974), where the court concluded that an even stronger case for deferring to the Secretary's expertise existed where he had determined that a violation did not affect the outcome of an election than where he found no violation at all.

[16] Since nearly all of these cases discussed the issue of reviewability in the context of mandamus, it is unclear whether they necessarily imply that the Secretary's discretion is absolute whatever the basis for jurisdiction or relief. See not 4, *supra*. In *Ravaschieri* v. *Shultz*, *supra* at 2275, for example, the court was careful to distinguish *Schonfeld* on the ground that the decision not to bring suit there was "palpably arbitrary and capricious," while in *Ravaschieri* the court found that the Secretary properly exercised his discretion after his investigation disclosed that the plaintiffs had failed to invoke their internal remedies as required by § 402(a), and that it would be difficult to prove that any violations which occurred affected the out-

decline to follow them. The Secretary may as easily defeat the purpose of the L-MRDA by irgnoring overwhelming evidence of violations affecting the outcome of an election as by refusing to file suit for reasons not intended by Congress. In either case, judicial review should be available to ensure that the Secretary's actions are not arbitrary, capricious, or an abuse of discretion. The Supreme Court has explained this scope of review as follows:

> Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' 5 U.S.C. § 706(2)(A) (1964 ed., Supp. V.). To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. [Citations omitted.] Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.

Citizens To Preserve Overton Park, Inc. v. *Volpe, supra* at 416. Thus, on remand, plaintiff is entitled to

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come of the election. Similarly, in *Howard* v. *Hodgson*, *supra*, the Court of Appeals did not even confront the issue of whether the Secretary's factual findings are reviewable, concluding only that the Secretary acted within his discretion in not filing suit where he determined that such violations as occurred did not affect the outcome of the election. See note 12, *supra*. However, the district court had decided that issue, 83 L.R.R.M. 3023, 3025 (E.D. Mo. 1973), and thus the Eighth Circuit's affirmance of the district court's dismissal apparently means that mandamus will not issue to review the Secretary's finding that a complaint is without merit.

a sufficiently specific statement of the factors upon which the Secretary relied in reaching his decision not to file suit so that plaintiff may have information concerning the allegations contained in his complaint.[17]

A True Copy:
Teste:

Clerk of the United States
Court of Appeals for the
Third Circuit.

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[17] The court recognizes that certain data in the Secretary's files may be privileged and confidential. *Cf. Weisberg* v. *U.S. Department of Justice*, 489 F. 2d 1195 (D.C. Cir. 1973); *Frankel* v. *Securities & Exchange Commission*, 460 F. 2d 813 (2d Cir. 1972). Whether the Government's interest in maintaining the confidentiality of such information outweighs the plaintiff's interest in their production should be a matter for the trial court to decide on motions for discovery so as to assure "a fair determination of the issues." *Mitchell* v. *Roma*, 265 F. 2d 633, 636 (3d Cir. 1959).

APPENDIX B

United States District Court for the Western District of Pennsylvania

Civil Action No. 73 0954

WALTER BACHOWSKI, PLAINTIFF

v.

PETER BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AND UNITED STEELWORKERS OF AMERICA, DEFENDANTS

ORDER

AND NOW, this 12th day of November, 1973, upon consideration of Defendants' Motion to Dismiss the Complaint and after hearing oral arguments on the legal issues involved in the above captioned case, it is determined that this Court lacks jurisdiction over the subject matter of this Complaint and, accordingly,

IT IS ORDERED that the Motion of Defendants to Dismiss the Complaint is granted; and that the Motion of Plaintiff for a Temporary Restraining Order and the Motion for a Preliminary Injunction are hereby denied.

Hon. JUDGE DUMBAULD,
United States District Judge.

APPENDIX C

United States Court of Appeals for the Third Circuit
No. 73–2029

WALTER BACHOWSKI, APPELLANT

v.

PETER BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR AND UNITED STEELWORKERS OF AMERICA

(D.C. Civil Action No. 73–954)

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: SEITZ, *Chief Judge* and VAN DUSEN and GIBBONS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 12, 1973, be, and the same is hereby vacated and the cause will be remanded for further proceedings consistent with the opinion of this Court. No costs.

Attest:

THOMAS P. QUINN,
Clerk.

July 26, 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1974

Supreme Court, U. S.
FILED
FEB 6 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-466

PETER J. BRENNAN, SECRETARY OF LABOR, PETITIONER

v.

WALTER BACHOWSKI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED ON OCTOBER 22, 1974
CERTIORARI GRANTED DECEMBER 16, 1974

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-466

PETER J. BRENNAN, SECRETARY OF LABOR, PETITIONER

v.

WALTER BACHOWSKI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX TO APPENDIX

	Page
Docket entries	1
In the United States District Court for the Western District of Pennsylvania:	
Complaint	3
In the Supreme Court of the United States:	
Order Granting Petition for Writ of Certiorari	7

567-896—75——1

Relevant Docket Entries

United States District Court for the Western District of Pennsylvania

Civil Action 73-954 Walter Bachowski vs. Peter Brennan, et al.

Date	Proceedings	Date. Order. Judgment No.
Nov. 7	Complaint filed	1
Nov. 7	Motion for TRO	2
Nov. 7	Motion for preliminary injunction	3
Nov. 7	Summons issued as to U.S.; summons issued as to United Steelworkers	
Nov. 12	Order entered, on proposal filed 11/9/73 granting defts oral motion made at hearing in chambers, to dismiss; motion of pltf. for TRO and Prel. Inj. denied (Dumbauld, J.)	4
Nov. 29	Notice of Appeal filed by Pltf. ($250.00 Cash Bond Posted) (Receipt 17496)	6
Dec. 4	Summons ret. served on U.S. Steel 11/29/73	7
Dec. 4	Summons ret. served on U.S. Atty 11/29/73; on U.S. Atty Gen 11/30/73 by cert. mail 11/28/73	8
Dec. 10	Transcript of injunction hearing held before Dumbauld, J. filed (Rep. J. Lilienthal)	9
1974		
Aug. 5	Opinion of U.S. Ct. of Appeals rec'd and filed vacating judgment of district court granting motion to dismiss and case remanded for further proceedings	
Sept. 17	Certified copy of judgment order issued in lieu of formal mandate rec'd from U.S. Ct. of Appeals vacating judgment of district court entered 11/2/73 and cause remanded for further proceedings. No costs (record will be returned at a later date)	
Sept. 17	Pursuant to CC of judgment order, the above entitled case is hereby reopened	
Oct. 9	Motion to enter an order directing that the deft. provide the pltf. with a specific statement of the factors upon which the pltf. relied in reaching his decision not to file suit filed by pltf.	10
Oct. 25	Order entered directing opposition submit brief in re motion for production of statement in 5 days (Dumbauld, J.)	11
Nov. 11	Statement of Secy of Labor filed	12
Dec. 20	Order entered directing that since the conditions requiring posting of cash bond have been satisfied as of 9/17/74; Clark is to return $250. to Kenneth Yablonski, Esq. (Dumbauld, J.) (Mailed 12/20/74)	13
1975		

Date 1973	
Dec. 4	Copy of Notice of Appeal, rec'd. Dec. 3, 1973, filed.
	Record, rec'd. November 30, 1973, filed.
1974	
July 26	Opinion of the Court (Seitz, Chief Judge and *Van Dusen* and Gibbons, Circuit Judges), filed.
July 26	Judgment vacating the judgment of the District Court entered November 12, 1973, and remanding the cause for further proceedings consistent with the opinion of this Court, with no costs, filed.
Aug. 16	Motion by appellee, for stay of mandate, filed. (4cc.) Service attached.
Aug. 20	Order (Van Dusen, J.) staying issuance of mandate until September 15, 1974, filed.
Aug. 23	Opposition by appellant to Motion for Stay of Mandate pending Supreme Court Review, filed. (4cc.) Service attached.
Sept. 3	Order Amending Slip Opinion of July 26, 1974, (Seitz, Ch.J., and *Van Dusen* and Gibbons Circuit Judges), filed.
Sept. 16	Certified judgment in lieu of formal mandate issued.
Sept. 16	Certified copy of order amending opinion sent to Clerk of District Court.
Sept. 25	Record and 2 supplementals returned to Clerk of District Court.
Oct. 26	Notice of filing on October 22, 1974 of petition for writ of certiorari, received from Clerk of S.C., filed. (S.C. No. 74-466).
Dec. 20	Certified copy of order dated December 16, 1974 granting petition for writ of certiorari received from Clerk of S.C., filed. (S.C. No. 74-466).

In the United States District Court for the Western District of Pennsylvania

Civil Action No. 73-954

WALTER BACHOWSKI, PLAINTIFF

v.

PETER BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, AND UNITED STEEL WORKERS OF AMERICA, DEFENDANTS

Complaint for Injunctive and Declaratory Relief

1. Walter Bachowski, plaintiff, resides at 8 Cross Street, Pittsburgh, Pennsylvania within this judicial district. He is a member in good standing of the United Steel Workers of America, its District 20 and local union 1504.

2. Plaintiff brings this action as an individual union member under Title IV of the Labor Management Reporting and Disclosure Act of 1959 (29 USCA 482) (hereinafter referred to as LMRDA or the "Act").

3. Defendant Peter Brennan, (hereinafter referred to as the Secretary) is the Secretary of Labor of the United States and for the purpose of carrying out his duties maintains an office at the Federal Building, Liberty Avenue, Pittsburgh, Pennsylvania, which is within this judicial district.

4. Defendant United Steel Workers of America (Hereinafter called USWA) is a labor organization engaged in an industry affecting commerce within the meaning of Sections 3(i) and 3(j) of the Act (29 USCA 402 (i) and (j)), and has its principal office in Pittsburgh, Pennsylvania, within this judicial district.

5. This Court has jurisdiction of this action under Section 402 of the Act (29 USCA 482), Public Law 89-554 (5 USCA 702.)

6. Defendant USWA, purporting to act pursuant to and in accordance with the provisions of its Constitution held an

election for the office of District Director of District 20 USWA among its members in good standing on February 13, 1973. This election was subject to the provisions of Title IV of the Act (29 USCA 481 et. seq.).

7. District 20 USWA covers a geographical area from Erie, Pennsylvania to Pittsburgh, Pennsylvania and has approximately 75,000 members.

8. Plaintiff was a candidate for the office of District Director as was the incumbent Kay Kluz and Morros Brummitt. The election was hard fought with the large majority of the appointed staff men supporting the candidacy of the incumbent Kay Kluz.

9. On April 16, 1973, the International Tellers submitted their report in the International election declaring the result of the election in District 20 USWA to be as follows:

Kay Kluz	10,558
Walter Bachowski	9,651
Morros Brummitt	3,566

10. Pursuant to Article V, Section 21 of the Defendant USWA Constitution, the plaintiff filed a complaint with the International Executive Board of the USWA within ten days of April 28, 1973.

11. Notwithstanding the fact that the Defendant USWA had already scheduled its swearing in ceremonies for the following day, the Defendant USWA purported to conduct an investigation of and hearing concerning the plantiff's complaint on May 31, 1973. The hearing was a nullity in that it did not properly inquire into the election irregularities charged.

12. On June 1, 1973, the Defendant USWA installed the plaintiff's opponent as Director of District 20 despite the fact that the plaintiff had not been notified of any decision by the International Executive Board.

13. On June 21, 1973, the plaintiff filed a complaint with the Department of Labor at its Pittsburgh, Pennsylvania, office.

14. Pursuant to Section 601 and in accordance with Section 402 (B) of the Act (29 USCA 521, 482 (B)) the Defendant Secretary investigated said complaint.

15. On approximately September 8, 1973, at the request of the Defendant USWA, the Defendant Secretary and the Defendant USWA agreed to extend the statutory period for investigation thirty days. On October 8, 1973, again at the request

of the Defendant Union, the period was extended to November 8, 1973.

16. On November 5, 1973, the plaintiff received a phone call from the Pittsburgh office of the Defendant Secretary advising him that the Defendant Secretary had decided not to file suit to set aside the contested election in District 20 USWA. To date, the plaintiff has received no written notice of this decision nor any explanation of why the suit would not be filed.

17. Plaintiff contends that in the conduct of the aforesaid election the Defendant USWA violated its constitution and the provisions of Title IV of the Act (29 USCA 401 et. seq.) as follows:

A. Section 401(A) of the Act failed to elect by secret ballot in that many members were required or permitted to vote in such a manner that a member voting could be identified with the choice expressed.

B. Section 401(C) of the Act, Union failed to provide adequate safeguards and denied the plaintiff the right to have observers at polling places and at the counting of the ballots.

C. Section 401(E) of the Act, the Defendant Union violated its own Constitution, it denied members the right to vote without fear of reprisal, interference or penalty, and members were denied the right to vote in that elections were not conducted in at least one local.

D. Section 401(G) in that the Defendant USWA used money received as dues and assessments to promote the candidacy of the plaintiff's opponent the incumbent Kay Kluz.

18. Notwithstanding the fact that the Defendant Secretary's investigation has substantiated the plaintiff's allegations and notwithstanding the fact that the irregularities charged affected the outcome of the election the Defendant Secretary refuses to file suit to set aside the election.

19. On November 7, 1973, the plaintiff requested the Defendant Secretary and the Defendant USWA to mutually agree to extend the statutory period for filing suit to enable him to properly inquire into the Defendant Secretary's refusal. The Defendant USWA immediately refused.

20. The plaintiff has not been given a statement of reasons why the Defendant Secretary will not file suit nor has he been permitted to review the records available to the Secretary upon which his decision was made.

21. Defendant USWA has breached its duty to properly protect the plaintiff's rights under Title IV of the Act and further, it has breached its duty of fair representation of him regarding the entire matter of the conduct of the election and the post election investigation.

22. The Defendant Secretary and the Defendant Union are acting in an arbitrary and capricious manner in failing to extend the period to file suit to enable the plaintiff to inquire into the reasoning of the Defendant Secretary.

WHEREFORE, plaintiff prays for judgment as follows:

(a) That the Court declare the actions of the Defendant Secretary to be arbitrary and capricious and order him to file suit to set aside the aforesaid election.

(b) That the Court direct the Defendant Secretary and the Defendant USWA to extend the period of time for filing suit to enable the plaintiff to properly inquire into the reasoning of the Secretary.

(c) That the Court direct the Defendant Secretary to make available for examination by the plaintiff all evidence it has obtained concerning its investigation of the aforesaid election.

(d) Award such costs and counsel fees as may be appropriate.

(e) Grant such other relief as may be appropriate.

/s/Kenneth J. Yablonski
KENNETH J. YABLONSKI,
Attorney for Plaintiff.

COMMONWEALTH OF PENNSYLVANIA }
County of } *ss:*

Before me, the undersigned authority, personally appeared WALTER BACHOWSKI, who, being sworn according to law, deposes and says that the statements contained in the foregoing COMPLAINT are true and correct to the best of his knowledge, information and belief.

/s/Walter Bachowski
WALTER BACHOWSKI.

Sworn to and subscribed before me this 8th day of Nov., 1973.

/s/MELNA ZETZ,
Notary Public.

Commission Expires 5/27/76.

Supreme Court of the United States

No. 74–466

PETER J. BRENNAN, SECRETARY OF LABOR, PETITIONER

v.

WALTER BACHOWSKI

Order Allowing Certiorari

Filed December 16, 1974

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-466

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Petitioner,

v.

WALTER BACHOWSKI,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MEMORANDUM OF UNITED STEELWORKERS OF AMERICA, AFL-CIO

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MEMORANDUM OF UNITED STEELWORKERS OF AMERICA, AFL-CIO

Although not named in the caption of the petition for certiorari, United Steelworkers of America, AFL-CIO ("USWA") is a party herein pursuant to this Court's Rule 21(4).[1] USWA shares the view of the Secretary of Labor, expressed in his petition, that this case warrants review by

---

[1] USWA was a co-defendant with the Secretary of Labor in the district court (Petition, page 21A), and was an appellee in the Court below (*Id.*, page 1A).

this Court.[2] In this memorandum, we briefly describe the importance of this case from the vantage point of unions whose elections are regulated by Title IV.

ARGUMENT

In *Trbovich* v. *Mine Workers,* 404 U.S. 528, 537 (1972), this Court recognized the Congressional intention "to insulate the union from any complaint that did not appear meritorious to . . . the Secretary." The decision below, by opening the door to possible suits on claims which the Secretary has found without merit, is in apparent conflict with the statutory scheme adopted by Congress and recognized in *Trbovich.* Moreover, as explained herein, the decision below will have adverse effects upon unions' abilities to perform effectively, effects which Congress did not intend.

It is self-evident that a union officer whose election is under challenge is handicapped in the performance of his duties. Congress was sensitive to this problem when it enacted Title IV. One of its objectives was "to settle as quickly as practicable the cloud on the incumbents' title to office . . ." *Wirtz* v. *Bottle Blowers Association,* 389 U.S. 463, 468-469, n. 7 (1968). To that end, Congress specified time limits both for the filing of members' complaints with the Secretary, 29 U.S.C. §482(a), and for the institution of lawsuits by the Secretary when he finds such complaints meritorious, 29 U.S.C. §482(b).

The decision below, by allowing private actions challenging the Secretary's determination that suit under Title IV is

[2] The issue presented relates to the scope of the Secretary's authority under Title IV of the LMRDA. USWA, believing that such an issue is more appropriately presented to this Court by the Secretary than by private parties subject to that authority, refrained from filing its own petition. However, USWA fully supports the Secretary's perception of his authority, and thus agrees with the Secretary that the case was wrongly decided by the court below and that, at the least, the decision below warrants review by this Court.

not warranted, necessarily extends the period during which a union officer's status remains under a cloud. Nor should it be assumed that the filing of such private actions would be limited to the rare situations in which a credible claim could be mounted that the Secretary has abused his discretion. The realities of union politics being what they are, a defeated candidate has many reasons, independent of any hope of ultimate litigation victory, for filing such an action. The action serves, in effect, as the kick-off of his campaign for the *next* union election. He is likely to achieve considerable notoriety by the filing of such an action, and its pendency enables him to appeal to the electorate that he was "robbed" in the last election and deserves their consideration in the next.

By opening the judicial gates to such actions, the decision below invites a flood. The experience in USWA's 1973 election is an augur. Complaints were filed to the Secretary involving four offices, and the Secretary brought suit only with respect to the two complaints which he found meritorious. Each of the other two complainants filed a private action challenging the Secretary's failure to file suit on his behalf.[3]

It is of course theoretically conceivable that the Secretary might someday decline to sue in circumstances which a court might later find arbitrary or capricious. But Congress clearly believed that that danger was outweighed by the harm which would result from permitting the host of lawsuits in which such a claim would be advanced frivolously. The "limited resources of the Secretary" (*Hodgson* v. *Steelworkers,* 403 U.S. 333, 339 (1971)) and of the union would be diverted from their assigned functions; the courts would be overburdened; and the union's ability to represent its mem-

[3] In addition to the instant case, see *Valenta* v. *Brennan,* Civ. Ac. No. C-74-11 (N.D. Ohio, Eastern Div.).

bers would be hampered by the continuing doubt whether its officers were properly elected and would serve out their term. At the least, considering the conflict among the lower courts, these consequences should not be allowed without prior review by this Court.

Respectfully submitted,

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BRIEF IN OPPOSITION

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---

BRIEF IN OPPOSITION

Respondent, Walter Bachowski, opposes the Petition for Writ of Certiorari for the reasons presented herein.

COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the determination of the Secretary of Labor not to bring suit under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 to upset a

challenged union election is beyond the scope of permissible judicial review even if such determination is arbitrary and capricious or is so outrageous as to amount to an abuse of discretion.

COUNTERSTATEMENT OF THE CASE

Respondent Walter Bachowski was a candidate for the office of District Director of District 20 of the United Steelworkers of America in an election held on February 13, 1973. By the Steelworkers' own count, he was defeated by the narrow margin of 907 votes out of approximately 24,000 votes cast. After exhausting intra-union remedies without satisfaction, he complained to the Department of Labor, June 21, 1973, presenting evidence of substantial wrong-doing in violation of the Steelworkers' constitution and of Title IV, LMRDA, which affected the election outcome. Following investigation of the complaint, the Secretary sent respondent a notification advising him of the determination not to bring suit seeking to upset the election, but wholly failing to state any reasons whatever other than the most conclusory recital that it had been determined that action would not be warranted. Respondent then brought the present suit, naming the Secretary and the Union as defendants.

Respondent relies upon the description of his complaint, set forth in the opinion of the court of appeals. As the Secretary himself concedes, the complaint, of course, must be accepted here as wholly correct. The Court stated as follows:

> "The complaint alleges, *inter alia*, that the Secretary's investigation had substantiated the enumerated charges of election irregularities and that these irregularities affected the outcome of the election, but that the Secretary nevertheless refused to file a suit to set aside the election and failed even to inform Bachowski of his reasons for that refusal. The complaint concludes that these actions by the Secretary were arbitrary and capricious and requests that the district court direct the Secretary (1) to make available to the plaintiff all evidence he has obtained concerning his investigation of the contested election, (2) to reach an agreement with the union extending the period of time for filing suit to set aside that election, and (3) to file such suit" (Pet. App. p. 3A).

As stated by the Secretary, the district court dismissed the complaint for lack of jurisdiction. The court of appeals unanimously reversed, finding jurisdiction and concluding that the Secretary's determination not to bring suit is subject to judicial inquiry whether his action was arbitrary and capricious or an abuse of discretion.

REASONS FOR DENYING THE WRIT

Stripped of ornamentation the Secretary's claim is simply that Title IV, LMRDA, gives him the right to resolve union election challenges however he chooses, even arbitrarily and capriciously, wholly without judicial check. Coming from a responsible government official, the position is arrogant and more than a little shocking. Also it is at odds with the legislative command of Section 402(b) of LMRDA that the Secretary *shall* bring suit to upset a challenged election when his investigation reveals probable cause to do so. The holding of the court of appeals does no more than reject the Secretary's extraordinary claim and hardly presents a proper occasion for exercise of the certiorari power.

1. The asserted conflict between the decision of the court of appeals and *Howard* v. *Hodgson*, 490 F.2d 1194 (C.A. 8, 1974) and *Brennan* v. *Silvergate District Lodge No. 50*, Nos. 72-2657, *et al.* (C.A. 9, September 13, 1974) is illusory.

Contrary to the petition, *Howard* does not hold the Secretary's determination not to sue under Title IV immune from review as to whether such determination was arbitrary and capricious or an abuse of discretion. The *Howard* plaintiffs—unlike respondent—were not challenging the Secretary's determination on that basis. Theirs was a case where the Secretary had found Title IV violations but had determined that such violations had not affected the outcome of the election. The *Howard* plaintiffs claimed that whenever the Secretary's investigation reveals Title IV violations, he is compelled to bring suit and leave the question of effect on outcome for a court. Accordingly, their suit was in the nature of mandamus to compel initiation of suit, which they maintained was required by law. The Eighth Circuit looked to a regulation promulgated by the Secretary to the effect that the Secretary will not bring suit unless his investigation reveals that such violations as occurred may have affected the election outcome. 29 CFR 452.16(b). Reciting that "/n/o useful purpose would be served by requiring the Secretary of Labor to bring frivolous suits," 490 F.2d at 1196, the Eighth Circuit sustained the regulation and held that the Secretary has discretion to determine the question of effect on election outcome, as well as the question whether violations occurred. But the *Howard* court stressed that its holding "is not to say that the Secretary's discretion under Section 482 is absolute." 490 F.2d at 1196. Respondent—unlike the *Howard* plaintiffs—admits that the Secretary has discretion but

claims in this case that the Secretary's determination was so arbitrary and capricious as to amount to an abuse thereof. To the extent that *Howard* speaks to this question, the explicit limitation on its holding—wholly overlooked in the petition—indicates that such administrative action is not immune from review.

Brennan v. *Silvergate District Lodge, supra,* is still further from the point. That was a case in which an incumbent union official, who had been defeated in a rerun election conducted pursuant to court order under the Secretary's supervision, sought to intervene to challenge the Secretary's certification to the district court of the election results. The Court of Appeals held that intervention had properly been denied. While respondent seriously questions the correctness of that decision,[1] the decision does not conflict with that of the Third Circuit here. That case involved the right to intervene; it did not involve an attempt to secure judicial review of a determination of the Secretary which was asserted to be arbitrary and capricious or an abuse of discretion. There is nothing in the Ninth Circuit case which can fairly be read as barring judicial review in a case such as this.

2. Its assertions of conflict evaporating, all that is left of the petition is its parade of ways in which it is said that the court of appeals decision will undermine effective enforcement of Title IV.[2] To

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[1] See *Hodgson* v. *Carpenters Resilient Flooring Local Un. No. 2212*, 457 F.2d 1364 (C.A. 3, 1972), which would have allowed intervention in the *Silvergate* situation.

[2] The Secretary also seeks to analogize his determination whether to bring suit to the discretion exercised in determining whether to commence criminal prosecution. This contention is effectively answered by the discussion in the opinion of the Court of Appeals (Pet. App. A, pp. 12A *et seq.*). Respondent notes only that this

listen to the Secretary, effective Title IV enforcement depends upon his being allowed to proceed, without check, exactly as he chooses. It is said that the court of appeals decision will destroy the "screening process" which Congress intended would protect unions from frivolous litigation; that it will take away the centralized administration of LMRDA without which "a rational and coordinated program of implementation" would be impossible; that it will hamstring the Secretary in settling challenges with unions whose elections are challenged; and that it would upset the statutory timetable which directs that the Secretary bring suit, if at all, within 60 days of receiving a Title IV complaint.

All of these horribles are now thoroughly familiar, because the Secretary has paraded them every time his insistence upon absolute license to proceed as he wishes has been challenged in any way. Cf. *Trbovich* v. *UMWA*, 404 U.S. 528 (1972). The Title IV screening process was intended to assure that meritorious challenges would be forcefully litigated as well as to see that frivolous ones are weeded out; the limited review contemplated by the court of appeals decision would do no more than assure that the process is working as Congress intended.

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case is far different from *Vaca* v. *Sipes*, 386 U.S. 171 (1967), which referred to an appellate decision holding that the NLRB General Counsel's discretion whether to institute an unfair labor practice charge is unreviewable. *Vaca* held that a union member asserting breach of the duty of fair representation is free to pursue a judicial remedy even though the Board has refused to proceed. It is precisely because the Title IV complainant does not have any other means of challenging a union election than through the Secretary of Labor—and because this Court has recognized that the Title IV complainant has distinct interests commanding judicial recognition and protection (*Trbovich* v. *UMWA*, 404 U.S. 528 (1972))—that judicial review should be available to assure that the Secretary's discretion has not been abused.

The Secretary's protestation that the court of appeals decision would inhibit him from entering into settlement agreements with unions reflects the same disdain for the rights and interests of Title IV complainants which the Secretary displayed to the Court in *Trbovich, supra.* The Court in *Trbovich* recognized that the complainant does have interests in Title IV matters which are distinct from the Secretary's interests and which deserve protection. A complainant who has intervened in Title IV litigation under the authority of *Trbovich* has a far greater opportunity to stand in the way of a settlement proposed by the Secretary and the Union, than does a complainant who bears the burden of showing that the Secretary's action is an abuse of discretion. The court of appeals here—in upholding limited judicial review at the behest of the complainant where it is alleged that the Secretary has acted arbitrarily and capriciously—simply put itself in step with the decision of this Court in *Trbovich, supra;* cf. *International Union, UAW* v. *Scofield,* 382 U.S. 205 (1965).

Perhaps most ill-graced is the Secretary's plea for preservation of the 60-day statutory timetable for initiation of suits. The Secretary routinely enters into agreements with unions for extensions of time within which suit may be brought, and in fact agreed to two such extensions in this very case. If the Secretary and unions under investigation can delay suit for no reason other than their own convenience, surely suit can also be filed outside the 60-day period without disservice to effective enforcement, where the Secretary's original determination not to bring suit is found by a court to have been arbitrary and capricious.

* * *

Under Title IV the Secretary of Labor is entrusted with vast power and broad discretion, but if the legislative goal is to assure that union elections are fair and democratic, the Secretary's power must be responsibly exercised. It is upon responsible exercise of the Secretary's power—and not upon the unbridled license for which the Secretary contends—that effective enforcement of LMRDA depends. As with any administrative program, arbitrary and capricious conduct on the part of the administrator is far more inimical to interests of rationality than the limited review necessary to see that his discretion is exercised within bounds. There is no merit in the Secretary of Labor's quest for an immunity from judicial review not accorded any other agency head administering statutes similarly yielding broad administrative discretion.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Summary of argument	6
Argument:	
The LMRDA precludes judicial review of the Secretary's determination not to file suit to set aside a union election	8
A. The Act authorizes only pre-election private remedies and specifies that suit by the Secretary shall be the exclusive method of "challenging an election already conducted"	10
B. The Act's legislative history shows that Congress did not intend the Secretary's determinations whether to bring suit to set aside union elections to be subject to judicial review	12
C. This Court's decisions recognize that the Act vests in the Secretary conclusive discretion to determine whether to seek judicial review of post-election complaints	16
D. The entertainment of suits to compel the Secretary to bring suit would be contrary to the policies of Title IV's remedial provisions	18

Argument—Continued	Page
E. The Secretary is entitled to the usual scope of prosecutorial discretion	25
Conclusion	32
Appendix	1a

CITATIONS

Cases:

Adams v. *Richardson*, 480 F.2d 1159	9
Altman v. *Wirtz*, 56 LRRM 2651	25
Auto Workers v. *Scofield*, 382 U.S. 205	27
Brennan v. *Silvergate District Lodge No. 50*, 503 F.2d 800	25
Brotherhood of Railway and Steamship Clerks v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650	26
Calhoon v. *Harvey*, 379 U.S. 134	16, 20, 22, 23
Confiscation Cases, The, 7 Wall. 454	28, 30
DeVito v. *Shultz*, 300 F. Supp. 381	25
Federal Trade Commission v. *Klesner*, 280 U.S. 19	28
Georgia v. *Mitchell*, 450 F.2d 1317	28
Hodgson v. *International Printing Press. & Assist. Union*, 440 F.2d 1113, certiorari denied, 404 U.S. 828	24
Hodgson v. *Local 6799, United Steelworkers of America*, 403 U.S. 333	17, 23
Hodgson v. *Lodge 851, Int. Assn. of Mach. & Aerospace Workers*, 454 F.2d 545	24
Howard v. *Hodgson*, 490 F.2d 1194	25
Katrinic v. *Wirtz*, 62 LRRM 2557	25

Cases—Continued	Page
Linda R.S. v. *Richard D.*, 410 U.S. 614	28
McArthy v. *Wirtz*, 65 LRRM 2411	25
Morrissey v. *Shultz*, 311 F. Supp. 744	25
National Railroad Passenger Corp. v. *National Association of Railroad Passengers*, 414 U.S. 453	26
Peek v. *Mitchell*, 419 F.2d 575	28
Powell v. *Katzenbach*, 359 F.2d 234, certiorari denied, 384 U.S. 906	28
Ravaschieri v. *Shultz*, 75 LRRM 2272	25
Schonfeld v. *Wirtz*, 258 F. Supp. 705	25
Switchmen's Union v. *National Mediation Board*, 320 U.S. 297	26, 28, 29
Trbovich v. *United Mine Workers*, 404 U.S. 528	8, 14, 18, 19, 20, 23, 27, 31
United Electrical Contractors Association v. *Ordman*, 366 F.2d 776, certiorari denied, 385 U.S. 1026	27
Vaca v. *Sipes*, 386 U.S. 171	27, 28
Valenta v. *Brenna*, No. C74-11 (N.D. Ohio, decided July 3, 1974)	26
Wirtz v. *Great Lakes District Local 47*, 240 F. Supp. 859	25
Wirtz v. *Independent Workers Union*, 65 LRRM 2104	25
Wirtz v. *Local Union 125, Laborers' International Union*, 389 U.S. 477	17, 27
Wirtz v. *Local 153, Glass Bottle Blowers Association*, 389 U.S. 463	17, 23, 31
Wirtz v. *Local Union 1622*, 285 F. Supp. 455	25
Yick Wo v. *Hopkins*, 118 U.S. 356	9

Statutes: Page

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 555(e) 5
5 U.S.C. 701(a) 3, 5
5 U.S.C. 701(a)(1) 3, 9
5 U.S.C. 701(a)(2) 3, 5, 9
5 U.S.C. 702 5
Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401, *et seq.*:
Preamble (29 U.S.C. 401) 31
Section 401 (29 U.S.C. 481) 4, 10, 13
Section 401(c) (29 U.S.C. 481(c) 10
Section 402 (29 U.S.C. 482) 2, 11, 12, 17, 23
Section 403 (29 U.S.C. 483) 3, 6, 9, 11

Miscellaneous:

104 Cong. Rec. 7953-7954 12
104 Cong. Rec. 7954 20
104 Cong. Rec. 10947 ..... 12, 15
104 Cong. Rec. 11005 15
104 Cong. Rec. 18288 13
105 Cong. Rec. 6745 14
105 Cong. Rec. 10101-10102 15
H. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 15
H.R. 8400, 85th Cong., 2d Sess. 15
Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on Labor-Management Reform Legislation, S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311, 86th Cong., 1st Sess. 13, 14, 21

Miscellaneous—Continued Page

Posner, *The Behavior of Administrative Agencies*, 1 J. Legal Studies 305 (1972) 29
S. 3751, 85th Cong., 2d Sess. 12, 15
S. 3974, 85th Cong., 2d Sess. (Kennedy-Ives Bill) 12, 13
S. 505, 86th Cong., 1st Sess. 13
S. 748, 86th Cong., 1st Sess. (Goldwater-Administration Bill) 13
S. 1555, 86th Cong., 1st Sess. (Kennedy-Ervin Bill) 15
S. Rep. No. 1684, 85th Cong., 2d Sess. 13, 23
S. Rep. No. 187, 86th Cong., 1st Sess. 14, 15, 23
Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1221 (1961) 12

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-466

PETER J. BRENNAN, SECRETARY OF LABOR, PETITIONER

v.

WALTER BACHOWSKI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1A-20A) is reported at 502 F.2d 79. The order of the district court (Pet. App. B, p. 21A) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. C, p. 22A) was entered on July 26, 1974. The pe-

tition for a writ of ceritorari was filed on October 22, 1974, and granted on December 16, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a disappointed union office seeker may invoke the judicial process to compel the Secretary of Labor to bring an action under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 to set aside a union election.

STATUTES INVOLVED

Section 402 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U.S.C. 482, provides in pertinent part:

> (a) A member of a labor organization—
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body, or
>
> (2) who has invoked such available remedies without obtaining a final decision within three calendar months after their invocation,
>
> may file a complaint with the Secretary within one calendar month thereafter alleging the violation of any provision of section 481 of this title * * *. The challenged election shall be presumed valid pending a final decision thereon * * * and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

> (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office to set aside the invalid election, if any, and to direct the conduct of an election or hearing and vote upon the removal of officers under the supervision of the Secretary * * *.

Section 403 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 534, 29 U.S.C. 483, provides in pertinent part:

> * * * The remedy provided by this subchapter for challenging an election already conducted shall be exclusive.

The Administrative Procedure Act, 5 U.S.C. 701 (a), provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

STATEMENT

Respondent Walter Bachowski unsuccessfully sought election as District Director of District 20, United Steelworkers of America. After exhausting his remedies within the union respondent filed a timely complaint with the Secretary of Labor on

June 21, 1973, alleging violations of Section 401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). Respondent's was one of six complaints filed with the Secretary concerning the conduct of elections for District Directors in the Steelworkers union.

After investigating these complaints the Secretary filed suit to set aside the elections in Districts 15 and 31. The Secretary also undertook an extensive investigation of respondent's complaint, twice receiving from the union extensions of time during which to continue the investigation.[1] The Secretary determined there was not adequate ground to believe that a violation had occurred in the conduct of the election in District 20 that could have affected its outcome, and accordingly notified respondent that he would not commence a suit to set aside the election.

Respondent then brought suit against the Secretary and the union, seeking to compel the Secretary to file an action to set aside the election. His complaint alleged that the union violated Section 401 because some members voted in a manner that made it possible to determine how they voted; that he was denied observers at some polling places; that there was no election in at least one local; and that the incumbent

[1] These facts are taken from Bachowski's complaint (App. 3-6), from the opinion of the court of appeals, and from information made available to us by the Secretary of Labor. Because the district court dismissed Bachowski's complaint for want of "jurisdiction" (Pet. App. B, p. 21A), all of the factual allegations (although not the legal conclusions) in the complaint must be accepted as correct.

used dues money to aid his reelection (App. 5). The complaint also alleged that the Secretary's investigation had substantiated these charges (*ibid.*).

On November 9, 1973, two days after the complaint was filed (and before the Secretary had an opportunity to file a formal answer), the district court after a short oral argument, dismissed the complaint for lack of "jurisdiction over the subject matter" (Pet. App. B, p. 21A).

The court of appeals reversed. The court reasoned that there is a presumption of reviewability under the Administrative Procedure Act (5 U.S.C. 702) and that all administrative decisions are reviewable unless review is specifically prohibited by 5 U.S.C. 701(a). Because the court of appeals concluded that the Secretary's decision not to challenge the union election was not "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2), it ordered the case remanded to the district court for a hearing[2] to determine whether the Secretary had abused his discretion by failing to file an action to set aside the election.

The court of appeals rejected the government's argument that judicial intervention is foreclosed by the LMRDA, which provides that the Secretary's

[2] The court of appeals also required the Secretary to furnish to Bachowski a statement of his reasons for not filing an action. We do not contest this portion of the court's holding (see 5 U.S.C. 555(e)). An extensive statement setting out the Secretary's investigative technique and narrating his findings has been submitted to the district court, and is reprinted as an Appendix to this brief, *infra*, pp. 1a-16a.

suit shall be the "exclusive" remedy for the enforcement of Title IV (29 U.S.C. 483). The court apparently thought it persuasive that if the Secretary "wrongfully refuses to file suit, individual union members are left without a remedy" (Pet. App. A, p. 15A).

SUMMARY OF ARGUMENT

Respondent in this case seeks to achieve through indirection what cannot be done directly—the institution of a lawsuit against a labor organization, by one of its members, to set aside an election of officers because of alleged violations of Title IV of the LMRDA.

Under Title IV a suit by the Secretary of Labor is the exclusive post-election remedy for a violation of its provisions. The legislative history of this exclusive suit provision demonstrates that centralization of Title IV enforcement machinery in the Secretary resulted from a deliberate decision to preclude private litigation challenging the results of union elections.

The remedial provisions of Title IV would be enlarged in a manner contrary to the legislative intent by allowing a disappointed union office seeker to sue to compel the Secretary to prosecute his complaint against the union. Title IV was a considered compromise between the desire, on the one hand, to provide union members with a workable guarantee of internal democracy and the benefits, on the other, of insulating the unions from excessive interference in their internal affairs and the need to defend against

unmeritorious post-election suits by disgruntled members. The legislative compromise interposed the Secretary between the union and members complaining about election results; the Secretary evaluates and investigates the complaints, and proceeds against the union only when there is probable cause to believe that violations have occurred and might have affected the outcome of the election, and when attempts to settle the dispute with the union have been unsuccessful. Unlike a member involved in election infighting, the Secretary can make a distinterested judgment with the broader public interest in mind and does not file suit unless the member's complaint probably is meritorious.

If the Secretary's determinations that there is insufficient reason to file suit are opened to challenge, it will be possible to hale the union into court to defend its elections at the behest of any member; this will substantially burden the unions even when the Secretary's decisions are vindicated. Moreover, the filing of a suit against the Secretary will create an unnecessary cloud upon the union election, a cloud that may not be dissipated for much, or even all, of the period until the next election. If the court directs the Secretary to file suit, that suit could come long after the limitations period in Title IV, and unduly delay final resolution of any contest concerning the election. Finally, the possibility that a court could compel the Secretary to bring an action would reduce the incentive of a union to settle any complaint concerning an election, because the Secretary no longer

would be able to promise immunity from suit in return for the settlement.

In light of the legislative purposes reflected in the remedial provisions of Title IV, it is appropriate to conclude that with respect to suits to set aside union elections, the Secretary possesses the same scope of prosecutorial discretion as is entrusted to other administrative agencies charged with prosecuting violations of the statutes they administer—their decisions to prosecute or not to prosecute, unless constitutionally discriminatory, are not subject to judicial review.

ARGUMENT

THE LMRDA PRECLUDES JUDICIAL REVIEW OF THE SECRETARY'S DETERMINATION NOT TO FILE SUIT TO SET ASIDE A UNION ELECTION

Respondent seeks to achieve by indirection what he cannot do directly—to bring a suit at his own behest against a labor organization to set aside an election of officers. Although the immediate relief sought by respondent is the institution of a suit by the Secretary, respondent will not benefit unless that suit is successfully prosecuted and a judgment is entered against the union. Indeed, respondent would undoubtedly exercise his right to intervene in that suit (*Trbovich* v. *United Mine Workers*, 404 U.S. 528) and play a significant role in its prosecution. And, although the suit to compel suit is directed against the Secretary, the union itself was joined and, as a practical matter, required to appear and defend in order to minimize the chance that the district court would compel the Secretary to bring an action. The

union itself is therefore a major party in interest even in the action against the Secretary. Indeed, the injury alleged by respondent stems directly from the actions of the union, rather than from the Secretary's determination not to sue.

We agree with the court of appeals that, ordinarily, final administrative decisions are judicially reviewable and may be set aside if arbitrary or capricious. But the Administrative Procedure Act expressly provides that judicial review of administrative action is not authorized when "statutes preclude judicial review" (5 U.S.C. 701(a)(1)) or when "agency action is committed to agency discretion by law" (5 U.S.C. 701(a)(2)). We submit that the LMRDA commits to the sole discretion of the Secretary the decision whether to bring an action to set aside a union election.[3] Section 403 (29 U.S.C. 483) provides that a suit by the Secretary shall be the "exclusive" remedy for a violation by a union of Title IV, and the legislative history of Title IV discloses that the decision whether to invoke this "exclusive" remedy has been entrusted to the Secretary's discretion.

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[3] This is not to suggest that there are no circumstances that might permit judicial review of the Secretary's decision not to bring an action. For example, if the Secretary were to declare that he no longer would enforce Title IV, or otherwise completely abrogate his enforcement responsibilities, judicial review might be appropriate. See *Adams* v. *Richardson*, 480 F.2d 1159 (C.A.D.C.). Similarly, review might be appropriate if the Secretary prosecuted complaints in a constitutionally discriminatory manner. See *Yick Wo* v. *Hopkins*, 118 U.S. 356. However, respondent's sole complaint is that the Secretary has exercised his judgment incorrectly in this case.

A. The Act Authorizes Only Pre-election Private Remedies And Specifies That Suit By The Secretary Shall Be The Exclusive Method Of "Challenging An Election Already Conducted".

The LMRDA carefully distinguishes between public and private remedies. Title I establishes individual and equal rights in union affairs and business, erforceable exclusively by private litigation. Titles II and III govern record keeping, financial disclosure and trusteeships, and provide for both private and public remedies. Title IV controls union elections. Section 401 (29 U.S.C. 481) requires that election be by secret ballot, that union members be allowed to vote without threat or reprisal, that the membership be notified of the election, and that no union dues be used to promote the candidacy of any person. It also gives candidates the right to equal treatmert in the distribution of campaign literature and access to membership lists.

Titles I and IV cover partially overlapping ground. Most of the prerequisites of union democracy, such as the right to be a candidate, to nominate candidates, and to participate in elections, are [illegible]ed by Title I. All of the provisions of Title I may be enforced by a suit by any member of the union, so that general defects in internal organization or procedures are open to pre-election challenge by the membership. Title IV, on the other hand, is directed primarily to abuses that may take place during the election itself. Section 401(c) of that Title (29 U.S.C. 481(c)) authorizes suits by any member to enforce the union's duties to distribute campaign literature without dis-

also covered in a more limited way

crimination in favor of an incumbent, and to make available to any candidate a membership list. Once an election has been held, however, any complaints about conduct during that election must be redressed according to the procedures specified in Section 402 (29 U.S.C. 482).

Section 402 provides that a union member who believes that the election was improperly conducted first must exhaust the internal union remedies available to him, or pursue those remedies for three months without obtaining a final decision. He may then, within one calendar month, complain to the Secretary of Labor. The Secretary is directed to "investigate such complaint and, if he finds probable cause to believe that a violation of [Title IV] has occurred and has not been remedied," within 60 days to "bring a civil action against the labor organization * * * to set aside the invalid election * * *." If the district court finds that the union violated Title IV, and that the violation "may have affected the outcome of [the] election," it declares the old election void and orders the union to conduct a new election under the supervision of the Secretary.

Section 403 (29 U.S.C. 483) specifies that "[t]he remedy provided by * * * [Title IV] for challenging an election already conducted shall be exclusive."

B. The Act's Legislative History Shows That Congress Did Not Intend The Secretary's Determinations Whether To Bring Suit To Set Aside Union Elections To Be Subject To Judicial Review.

Before the enactment of the LMRDA in 1959 union members had available (under state law) a few private remedies to ensure fair and democratic union elections. They could, for example, bring suit in state courts to compel union officers to comply with provisions of the union's constitution and bylaws and to require that elections be by secret ballot. Some abuses that might arise in connection with the actual conduct of the election were subject to judicial review in several states. But such lawsuits were expensive and the legal rights varied from state to state.[4]

On May 5, 1958, then Senator John F. Kennedy introduced S. 3751, which had as its basic purpose the establishment of "minimum public standards with respect to the election of union officers." 104 Cong. Rec. 7953-7954. The enforcement provisions of S. 3751, which was an embryonic version of Title IV of the LMRDA, were substantially similar to those in Section 402 as enacted. These enforcement provisions, including the section making suit by the Secretary the exclusive remedy, were incorporated without significant alteration into the more comprehensive Kennedy-Ives Bill, S. 3974, which was introduced on June 10, 1958, and passed by the Senate on June 17, 1958. The accompanying report,

[4] See Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1221 (1961); Remarks of Senator John F. Kennedy, 104 Cong. Rec. 10947.

S. Rep. No. 1684, 85th Cong., 2d Sess., explained that the safeguards of Section 301 of the bill (which became Section 401 of the LMRDA) "are to be enforced by the Secretary of Labor, upon complaint of any union member * * *," and that "private court litigation would be precluded" (*id.* at 13).

S. 3974 was defeated in the House by a narrow margin on August 18, 1958 (104 Cong. Rec. 18288). On January 20, 1959, Senator Kennedy introduced S. 505. Sections 301 and 302, the election and enforcement provisions, were practically identical to those of S. 3974 and retained the provision for exclusive enforcement by the Secretary.

On January 28, 1959, Senator Goldwater introduced S. 748, which was supported by the Eisenhower administration. This bill would have permitted the Secretary to conduct investigations on his own initiative and to bring actions to enforce election safeguards; however, it would have reserved to union members enforcement rights regarding issues not the subject of the Secretary's proceeding, and would have preserved "any existing rights or remedies" to which union members were entitled under state law. The AFL-CIO vigorously opposed the Goldwater bill, arguing that its private enforcement provision would "result in placing union officers in a straitjacket since they could be haled into court, virtually without limitation," to defend against frivolous or harassing suits. Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on Labor-Management Reform Legislation, S. 505,

S. 748, S. 76, S. 1002, S. 1137, and S. 1311, 86th Cong., 1st Sess. 567 (statement of Andrew Biemiller), 580-581 (analysis by Arthur Goldberg). See *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 534.

In the course of the hearings on S. 505 and S. 748, Professor Archibald Cox suggested a compromise: until an election was held a member should be permitted to "maintain an action to compel the observance of the constitution and bylaws of a labor organization * * *" (Hearings, *supra*, at 136), but that post-election enforcement should be vested exclusively in the Secretary. Professor Cox explained that exclusively public post-election enforcement would preclude harassment of the union by a multiplicity of suits on the one side and friendly suits aimed at foreclosing the Secretary's action on the other; it would prevent a "crazy quilt of State legislation and court decisions"; and it would "centralize control of the proceedings in the Secretary of Labor." Hearings, *supra*, at 135. See *Trbovich*, *supra*, 404 U.S. at 535. Professor Cox's suggested distinction between pre-election and post-election remedies was accepted by the Senate Subcommittee and is reflected in the Act.

The bill that finally emerged from the Senate Committee was S. 1555, the Kennedy-Ervin Bill, which passed the Senate on April 25, 1959 (105 Cong. Rec. 6745). S. 1555 was accompanied by S. Rep. No. 187, 86th Cong., 1st Sess., which stated (at 21):

> [S]ince the bill provides an effective and expeditious remedy for overthrowing an improperly held election and holding a new election, the Federal remedy is made the sole remedy and private litigation would be precluded.

Supporters of the Goldwater proposal did not object to placing in the hands of the Secretary exclusive control over suit under Title IV. The minority report from the Senate committee criticized the bill's "gimmicks," but the objections to the provisions that became Sections 402 and 403 concerned the preemption of state law by a uniform national standard, and provisions allowing unions to amend their bylaws to increase the time between elections. S. Rep. No. 187, *supra*, at pp. 93, 101 (minority views). Senator Goldwater prepared a lengthy statement for presentation to the House, explaining the Secretary's power to bring suit and concluding, "So far, so good." 105 Cong. Rec. 10101.[5] By the time S. 1555 was approved by the Senate the Secretary's exclusive post-election enforcement powers had been agreed upon.[6]

On August 13, 1959, the House passed H.R. 8400, which, unlike the Senate bill, permitted union members to bring suits to set aside elections. However,

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[5] In this commentary the Senator expressed continuing doubts about the bill's preemption of state remedies and state laws, and numerous substantive objections to the election provisions. 105 Cong. Rec. 10101-10102.

[6] Earlier, Senator Wiley had expressed concern that the exclusive suit provision of S. 2974 (the Kennedy-Ives bill) would destroy state-created rights of private suit (104 Cong. Rec. 10047; Senator Kennedy responded that private suits were too expensive and time consuming (*ibid.*). An attempt to amend the Kennedy-Ives bill to provide for private suits was defeated. 104 Cong. Rec. 11005.

the Conference Committee (H. Conf. Rep. No. 1147, 86th Cong., 1st Sess.) adopted the enforcement provisions of the Senate bill, which became Title IV of the LMRDA.

Thus, after extensive consideration of the question, Congress adopted the remedial provisions in Title IV that were designed to implement Professor Cox's proposal that "control" of post-election proceedings be centralized in the Secretary.

C. This Court's Decisions Recognize That The Act Vests In The Secretary Conclusive Discretion To Determine Whether To Seek Judicial Review Of Post-Election Complaints.

This Court first considered the role of the Secretary in bringing Title IV actions in *Calhoon* v. *Harvey*, 379 U.S. 134. It there held that individual union members cannot seek judicial enforcement of the rights protected by Title IV. As the Court explained (379 U.S. at 140-141):

> Title IV sets up a statutory scheme governing the election of union officers, * * * attempting to guarantee fair union elections in which all the members are allowed to participate. Section 402 of Title IV, as has been pointed out, sets up an exclusive method for protecting Title IV rights, by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV. Upon complaint the Secretary investigates and if he finds probable cause to believe that Title IV has been violated, he may file suit in the appropriate district court.

> It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest. * * * Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts.

In *Wirtz* v. *Local 153, Glass Bottle Blowers Association*, 389 U.S. 463, 473, and its companion case, *Wirtz* v. *Local Union 125, Laborers' International Union*, 389 U.S. 477, 482, the Court reiterated that "Congress deliberately gave exclusive enforcement authority to the Secretary," noting that "Congress rejected other proposals, among them plans that would have authorized suits by complaining members in their own right" (389 U.S. at 473).

In *Hodgson v. Local Union 6799, United Steelworkers of America*, 403 U.S. 333, the Court construed the "exhaustion of remedies" requirement of Section 402 to limit the scope of the Secretary's enforcement authority under Title IV. The Court held that the Secretary could not seek to invalidate an election upon a ground not protested internally by a union member, and supported this conclusion by observing that congressional recognition of "the need to eliminate election abuses" was coupled with "a desire to avoid unnecessary governmental intervention" and "unnecessary expenditure of the limited

resources of the Secretary of Labor." 403 U.S. at 339.

Most recently, *Trbovich* v. *United Mine Workers*, *supra*, reconciled the exclusive enforcement authority vested in the Secretary with the special role and function of the complaining member who activates the enforcement machinery of Title IV. The Court there held that such complainants are entitled to intervene in litigation already initiated by the Secretary, because such intervention would neither "subject the union to burdensome multiple litigation, nor * * * compel the union to respond to a new and potentially groundless suit." 404 U.S. at 536. However, because Congress intended "to insulate the union from any complaint that did not appear meritorious to both a complaining member and the Secretary" (*id.* at 537), the Court rejected the complainant's contention that he should be permitted as an intervenor to litigate issues that the Secretary had not seen fit to include in his complaint. That, the Court ruled, "would be to circumvent the screening function assigned by statute to the Secretary." *Ibid.* The Secretary's discretion thus was held to be conclusive, precluding judicial review of the issues he did not deem meritorious.

D. The Entertainment Of Suits To Compel The Secretary To Bring Suit Would Be Contrary To The Policies Of Title IV's Remedial Provisions.

Respondent seeks to circumvent the Secretary's exclusive authority to enforce Title IV by respecting the form but not the substance of that authority. It

is literally true that, if respondent were to prevail against the Secretary, it would be the Secretary rather than the union member who would then bring suit to set aside the union election. But such "interfere[nce] with the screening and centralizing functions of the Secretary" (*Trbovich*, *supra*, 404 U.S. at 533) would transfer to the courts a substantial part of the screening role intended for the Secretary, with attendant consequences that would be contrary to the important statutory purposes served by the remedial provisions of Title IV.

After analyzing the legislative history of Title IV, this Court concluded in *Trbovich* that

> Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons: (1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election. [404 U.S. at 532.]

The Court recognized that, in order not to subject unions to the burdens of being haled into court to answer even the most petty post-election complaints, Congress had interposed the Secretary, who is disinterested and unaffected by the daily swirl of emotion and infighting that accompanies election disputes, between the union and its members to screen post-election complaints. In so doing, Congress desired to reduce to a minimum disruption of union self-government based on mere personal involvement

of the union members and to substitute the more dispassionate judgment and broader perspective of the Secretary in pursuing the public interest in the conduct of particular elections in a democratic manner. By making the Secretary the sole judge of the adequacy of post-election complaints, Title IV was "intended to insulate the union from any complaint that did not appear meritorious to both a complaining member and the Secretary" (*Trbovich, supra,* 404 U.S. at 537).

The Secretary's screening role was intended to protect the unions both from post-election complaints without substance (which represent litle more than an attempt to continue through the judicial system the infighting that preceded the election) and from unnecessary interference in union affairs, in keeping with the Act's basic purpose—which was to improve, rather than replace, union self-government. Indeed, when Senator Kennedy introduced the bill, he described it as a "modest proposal" that would protect union members "without undue interference in the internal affairs of what I believe are essentially private institutions * * *." 104 Cong. Rec. 7954.

If judicial review of the Secretary's screening function were available, the unions effectively would be subject to post-election private lawsuits untested by a neutral monitor. Such lawsuits, although less burdensome to a union than the direct private action barred in *Calhoon, supra,* would be significantly more burdensome than raising a new issue in a prosecution already commenced by the Secretary, which was precluded by *Trbovich*. The union could be (as it was in this case) named as a defendant in the suit nominally against the Secretary; it could thus be "haled into court, virtually without limitation" (Hearings, *supra,* at p. 567). And, even if not named a defendant in the complaint, the union would need to defend the suit as an intervenor or *amicus* since it, as well as the Secretary, is a real party in interest; if the Secretary is ordered to commence a Title IV suit, the union must defend its election. The Secretary and the union, in defense of an action such as the present one, would have to offer proof not only of the propriety of the Secretary's investigative and decision-making techniques, but also of the conduct of the election that is the source of the underlying dispute.

Because the Federal Rules of Civil Procedure require a trial for all but obviously specious complaints, most complaints against the Secretary and the union would be likely to result in at least a short trial—the merits of a complaint turning on a detailed factual analysis of a complex election rarely are evident on the pleadings. Union resources (and those of the Secretary) would be diverted to the defense of the suit. And, although the union and the Secretary ultimately might persuade the district court that the Secretary did not abuse his discretion, the union would have been put to the task of defense, and its election would have been cast into doubt. The consequences would thus be substantially similar to those Congress sought to avoid by precluding private suits challenging the outcome of the election.

The entertainment of suits against the Secretary also would result in the possibility of multiple litigation over a single election, contrary to the congressional purpose to centralize in one forum all of the complaints about the conduct of an election in order to minimize the chance of multiple suits against the union and the possibility of conflicting results. Under the court of appeals' holding, more than one dissatisfied member presumably could bring suit against the Secretary concerning the same election, and these suits could proceed simultaneously before different judges. The Secretary and the union would be obliged to defend in each suit; one district court might compel the Secretary to prosecute, while another decided that the Secretary's actions were correct. Even in the absence of a multiplicity of suits a two-part series (member versus Secretary and union, followed by Secretary plus member as intervenor versus union) would be necessary whenever the member's complaint against the Secretary is successful. The evidence in the two suits would, of course, be similar, resulting in unfortunate duplication of judicial effort.

At least two additional policies of Title IV would be impaired by the availability of judicial review of the Secretary's decision not to bring suit. Permitting the loser of the election to seek to compel the Secretary to sue would substantially weaken the Secretary's ability to settle disputes concerning union elections. The exclusive right to enforce Title IV was placed in the hands of the Secretary in part to promote such settlements, which are more advantageous

than litigation because they may be achieved more swiftly and because, as voluntary acts, they are less intrusive into the union's affairs. See *Calhoon*, *supra*, 379 U.S. at 140; *Bottle Blowers*, *supra*, 389 U.S. at 471. Success in efforts to settle such cases often depends, however, on the Secretary's ability to assure the union that the settlement would resolve all disputes concerning the election, and that the bargain he strikes in settlement will be binding. Obviously the Secretary could not give this assurance if he could be compelled subsequently to prosecute against his will.

Finally, Title IV includes, as an integral part of the legislative program, a timetable providing for rapid action. Most union elections are held every three years. If disputes are not settled rapidly, union officers may operate under a cloud for a substantial part of their terms. Accordingly, Section 402 of the Act allows the Secretary only 60 days after he receives the complaint to investigate and, if necessary, to institute suit. This time limitation serves both the function of minimizing intrusion into union internal affairs [7] and the function of resolving as quickly as possible any cloud upon the office holders.[8]

By operating within the statutory timetables the Secretary often is able to provide prompt relief (if

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[7] See *Calhoon*, *supra*, 379 U.S. at 140; *Bottle Blowers*, *supra*, 389 U.S. at 471; *Hodgson* v. *Local 6799, United Steelworkers*, *supra*, 403 U.S. at 338-339; *Trbovich*, *supra*, 404 U.S. at 532-533, 534-535.

[8] As the Senate reports stated, "time is of the essence" in election disputes. S. Rep. No. 1684, *supra*, at p. 13; S. Rep. No. 187, *supra*, at p. 21.

possible by settling the dispute without resort to judicial proceedings). The more swift the remedy, the greater its effect in ensuring free and democratic elections and their attendant benefits to the membership and the public at large. On the other hand, any complaint by a member about the conduct of the election will cast into doubt the legitimacy of the election and of the propriety of the service of the incumbent; that cloud can be dispelled by the Secretary's decision not to file an action.[9] Allowing suits to compel the Secretary to sue would prevent either of these resolutions. The member's suit against the Secretary and the union would create a cloud on the office but prevent the resolution of the underlying dispute, for the Secretary's decision not to prosecute would not bring matters to an end. The cloud would continue until the district court, perhaps some time later, disposed of the complaint. Should the court require the Secretary to commence an action against the union, this challenge would come long after the election and well beyond the 60 day limit.[10] Thus, no matter which way

[9] This is, of course, a basic difference between pre-election actions under Title I, which may be brought by any member, and post-election actions under Title IV.

[10] Although the Secretary may (and did in this case) obtain the union's consent to extend the 60-day period in order to allow him to continue his investigation or conclude settlement negotiations (*Hodgson* v. *Lodge 851, Int. Assn. of Mach. & Aerospace Workers*, 454 F.2d 545 (C.A. 7); *Hodgson* v. *International Printing Press. & Assist. Union*, 440 F.2d 1113 (C.A. 6), certiorari denied, 404 U.S. 828), this is not inconsistent with the Act's emphasis on expeditious resolution of election disputes. The extension procedure allows the Secretary to come to more informed judgments on the merits and avoid suits that are not meritorious. Moreover, it allows the parties to engage in additional negotiations that might avert the need to bring any action. Both reasons for extension advance the policies underlying Title IV. Similarly, the courts have permitted the Secretary to bring suit after the 60 days have expired if the union has impeded his investigation. See, *e.g., Wirtz* v. *Local Union 1622*, 285 F. Supp. 455 (N.D. Calif.); *Wirtz* v. *Independent Workers Union*, 65 LRRM 2104 (M.D. Fla.); *Wirtz* v. *Great Lakes District Local 47*, 240 F. Supp. 859 (N.D. Ohio). To some extent the 60-day limitation period is for the benefit of the union itself, and its benefits may therefore be waived by agreement or obstruction.

the district court decides the member's suit against the Secretary, the emphasis in Title IV on prompt resolution of election disputes would be frustrated.

E. The Secretary Is Entitled To The Usual Scope Of Prosecutorial Discretion.

As previously discussed, the legislative history and this Court's decisions show the importance of the Secretary's role, under Title IV, as the sole prosecutor of complaints concerning completed elections. As the prosecutor of these complaints the Secretary is entitled to the usual scope of prosecutorial discretion.[11]

[11] The two other courts of appeals that have considered the scope of the Secretary's discretion have concluded that he has unreviewable authority to decide which claims are deserving of prosecution. *Howard* v. *Hodgson*, 490 F.2d 1194 (C.A. 8); *Brennan* v. *Silvergate District Lodge No. 50*, 503 F.2d 800 (C.A. 9). The majority of district courts are in agreement. See *McArthy* v. *Wirtz*, 65 LRRM 2411 (E.D. Mo.); *Morrissey* v. *Shultz*, 311 F. Supp. 744 (S.D.N.Y.); *Altman* v. *Wirtz*, 56 LRRM 2651 (D.D.C.); *Katrinic* v. *Wirtz*, 62

Title IV is comparable to other statutes that simultaneously set up a program and establish an exclusive method for their enforcement. For example, in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, petitioners sought unsuccessfully to challenge a certification of representatives by the National Mediation Board under the Railway Labor Act. The Court held there was no jurisdiction because the statutory right was to be enforced exclusively through the statutory remedy.[12] In language that is equally applicable here, the Court explained (320 U.S. at 301):

> Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. * * * All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced.

LRRM 2557 (D.D.C.); *Ravaschieri* v. *Shultz*, 75 LRRM 2272 (S.D.N.Y.). Contra, *Schonfeld* v. *Wirtz*, 258 F. Supp. 705 (S.D.N.Y.). Middle ground has been taken in *DeVito* v. *Shultz*, 300 F. Supp. 381 (D.D.C.) (Secretary ordered to give full statement of reasons; after submission of reasons suit dismissed, 72 LRRM 2682); and *Valenta* v. *Brennan*, No. C74-11 (N.D. Ohio, decided July 3, 1974) (statement of reasons required).

[12] See *Brotherhood of Railway and Steamship Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650. Cf. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453 (statute vesting enforcement in administrative agency excludes private right of action).

Similarly, the General Counsel of the National Labor Relations Board has unreviewable discretion to refrain from filing a complaint with the Board. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (citing *United Electrical Contractors Association* v. *Ordman*, 366 F.2d 776 (C.A. 2), certiorari denied, 385 U.S. 1026). The Secretary's role in deciding whether to prosecute an action under Title IV is similar to the role of the Board's General Counsel—in either case the prosecutor must determine whether there is probable cause to believe that a violation has occurred and, if so, whether it warrants adjudication.[13] The Secretary's role is discretionary, not ministerial. His function was explained in the Senate Report as follows:

> The Secretary is directed to investigate [any member's] complaint and determine whether there is probable cause to believe that an election was not held in conformity with the requirements of the bill. Since an election is not to be set aside for technical violations but only if there is reason to believe that the violation has probably affected the outcome of the election,

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[13] See *Wirtz* v. *Local Union No. 125, Laborers', supra*, 389 U.S. at 483 (noting similarity between enforcement of Title IV and enforcement of NLRA).

This similarity between the roles of the Secretary and the General Counsel in prosecuting cases based on the complaint of a union member also is shown by the similar way in which the complainant can intervene, but only after the public prosecutor has begun his action, and then only with respect to issues prosecuted by the Secretary or the General Counsel. Compare *Trbovich*, *supra*, with *Auto Workers* v. *Scofield*, 382 U.S. 205.

> the Secretary would not file a complaint unless there were also probable cause to believe that this condition was satisfied. [S.Rep. No. 187, *supra*, at p. 21.]

Other administrative agencies have been accorded similar discretion to prosecute, or decline to prosecute, alleged violations of the statutes they enforce. See, *e.g.*, *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25. *Vaca* v. *Sipes*, *Klesner*, and *Switchmen's Union*, and the position we take in this case all are in accord with the general rule that one charged with the task of prosecuting violations of a statute possesses both the discretion to prosecute and the discretion to refrain from doing so. In the absence of a constitutional violation, a prosecutor's exercise of that discretion is not subject to a judicial review.

For example, in *The Confiscation Cases*, 7 Wall. 454, the Court held that the Attorney General was at liberty to discontinue a civil action to confiscate a vessel, even though its successful prosecution would have produced substantial benefit for an informant, who could collect one-half the value of the seized vessel. In *Georgia* v. *Mitchell*, 450 F. 2d 1317 (C.A. D.C.), the court declined to entertain a challenge to the Attorney General's pattern of prosecutions to compel elimination of segregation in southern schools. See also *Powell* v. *Katzenbach*, 359 F. 2d 234 (C.A. D.C.) (collecting cases), certiorari denied, 384 U.S. 906; *Peek* v. *Mitchell*, 419 F. 2d 575 (C.A. 6). Cf. *Linda R.S.* v. *Richard D.*, 410 U.S. 614.

There is no meaningful difference between the Secretary's role in enforcing Title IV and the role of other prosecutors whose discretion has been sustained.[14] In every case the prosecutor has been invested with authority to sue, often on an exclusive basis. Where, as here, the statute confers exclusive prosecutorial authority, the substantive rights created by the statute are conditioned accordingly. See *Switchmen's Union*, *supra*. And whether or not public prosecution is the sole remedy, the prosecutor must be able to control his prosecutorial decisions in order to formulate and coordinate a coherent program of prosecutions.[15] He must allocate his limited resources between the investigation function and the prosecution function and, within those categories, formulate priorities of prosecution. If there are more potentially meritorious cases than there are resources to investigate and prosecute them fully, the prosecutor should be free to allocate his prosecution resources to the cases that will produce the most benefit for the public, rather than to those in which someone seeks to compel him to prosecute. In administering Title IV, the Secretary is able to make these judgments in light of his perspective into budgetary and personnel limitations and in light of his accumulated

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[14] Nor is there any indication that Congress intended a more constricted scope of prosecutorial discretion for the Secretary than is vested in other prosecutors similarly situated.

[15] Cf. Posner, *The Behavior of Administrative Agencies*, 1 J. Legal Studies 305 (1972).

experience with prosecutions across the country. It is on the basis of these perspectives—which of course are not fully shared by either an individual complainant or a court—that the Secretary is to evaluate the prospects of success for a prosecution, and to weigh that probable public benefit from a particular success in light of the necessary commitment of resources. And it is the Secretary who is politically answerable for the administration of his prosecutorial program. There is, in sum, substantial support, in policy as well as in precedent, for according to the Secretary a scope of prosecutorial discretion comparable to that of other agencies.

The court of appeals attempted to distinguish the cases supporting prosecutorial discretion by asserting that, in those cases, the prosecutor protected only the public interest, whereas under Title IV the Secretary protects the individual interests of the complaining member (Pet. App. A, pp. 13A-15A). If anything, however, the reverse is true. In *The Confiscation Cases* the Attorney General's suit to confiscate the vessel was unmistakably for the benefit of the informer, who was entitled by statute to receive one-half of the value of any confiscated vessel. Similarly, an employee who complains to the General Counsel of the National Labor Relations Board, if vindicated in an unfair labor practice proceeding, may collect substantial back pay remedies or other benefits. The stake of the complainants in such cases is thus more immediate than that of a complaining member in a Title IV case, who at most can hope that the old

election will be nullified and a new election held, but who even then would have only an opportunity to run, not a guarantee of success.

In any event, the policy of the LMRDA, as expressed in its preamble (29 U.S.C. 401), is not to bestow benefits on individual complainants, but to vindicate the interest of the membership in democratic procedures and of the public at large in labor peace. Under Title IV "Congress emphatically asserted a vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member." *Bottle Blowers, supra,* 389 U.S. at 475.[16] The Secretary should be allowed to vindicate this "vital public interest" free of challenge by members whose "narrower interest" may adversely affect the performance of his duties and hamper the attainment of Title IV's objectives.

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[16] Indeed, in *Trbovich, supra,* the Court's predominant rationale for allowing intervention by a union member was the recognition that suit by the Secretary protects public (not private) interests, and that the former may conflict with the latter.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1975.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 73 0954

WALTER BACHOWSKI, PLAINTIFF

v.

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor, and UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, DEFENDANTS

STATEMENT OF THE SECRETARY OF LABOR

On November 12, 1973, this Court, upon oral argument, dismissed the Complaint filed herein by the plaintiff, and further denied plaintiff's Motion for a Temporary Restraining Order and Preliminary Injunction. On appeal, the United States Court of Appeals for the Third Circuit, in a Judgment entered on July 26, 1974, ordered that the aforementioned Judgment of the District Court be vacated and the cause remanded for further proceedings consistent with the Opinion of the Third Circuit filed on July 26, 1974, as amended September 3, 1974.

On remand, this Court ordered the Secretary of Labor to furnish a statement of the reasons and explanations underlying his decision not to file suit pursuant to the complaint received from Mr. Walter Bachowski, a member in good standing of the United

Steelworkers of America, AFL-CIO-CLC (hereinafter referred to as the International).

Accordingly, defendant, Secretary of Labor, is furnishing the following information. However, it is respectfully submitted that defendant, Secretary of Labor, in furnishing this statement does not waive any legal claims raised in connection with this matter.[1]

Pursuant to a complaint received on June 21, 1973 from Mr. Walter Bachowski, the Secretary of Labor conducted an investigation of the February 13, 1973 election conducted by the International for the office of District Director, District 20. District 20 is the fourth largest Steelworker District and covers eight contiguous counties in Western Pennsylvania, running from Pittsburgh in the South to Erie in the North, and Ohio to the West. At the time of the election, District 20 was comprised of approximately 67,419 members.

In total, the Secretary's representatives investigated 80 of District 20's 190 local unions, including all 27 of the former District 50 locals (the Secretary has found from past experience that former District 50 locals have encountered an unusual number of election related problems due to their recent assimilation into the Union). In formulating an investigative plan the Department of Labor focused upon and investigated each and every local brought to its at-

[1] Defendant, Secretary of Labor, now has pending before the Supreme Court a Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

tention by Mr. Bachowski, both orally and in his written complaint. Investigators, while in the geographical areas of the locals designated by Mr. Bachowski, reviewed additional local unions on a random basis in those areas. Also, red flag locals were selected on a district wide basis where, for example, voter turnouts appeared to be inordinately high. In addition to the 80 in depth local union investigations, investigators interviewed numerous individuals including members, union officers and Mr. Bachowski himself concerning the events surrounding the District 20 election. Investigators also reviewed and examined documentary evidence for further investigative leads or potential violations. During the course of the entire proceeding, investigators worked hand in hand with Mr. Bachowski on an ongoing basis.

Because of the size of District 20 and the obvious limitations on available manpower (the Department of Labor was concurrently investigating elections conducted in five other Districts as well), it was not possible to investigate each and every local union in District 20. However, the above described investigative design was broadly conceived and was reasonably calculated to disclose all violations which may have occurred in the District wide election.

Therefore, it is readily apparent the Department conducted a thorough and exhaustive investigation into the District 20 election. Set forth below is a detailed analysis of the investigative findings, along with the numerical estimates of the votes which may

have been affected as a result of these violations. In reaching these numerical estimates, we have not considered figures which constitute a reasonably probable effect, but rather, will set forth votes which have been calculated to a maximum theoretical possibility. By using these maximized figures, we are giving in most instances the benefit of the doubt to Mr. Bachowski. For example, Local Union 2789 which will be discussed herein failed to conduct an election. Thus, by assuming that the entire membership of 249 would have voted, and moreover would have voted unanimously for Mr. Bachowski, we arrived at the maximized figure for possible effect on outcome of 249 votes. This method of computation, while theoretically possible, is highly unlikely, since, for example, in the entire District only about one-third of the members voted in the election. Thus, the reasonable probability in this Local Union is that only approximately one-third of the members would have voted had there been an election, and that those voting would not have given Mr. Bachowski an unanimity of the vote.

(1) *Local Union 2203*

The investigation in this Local Union disclosed a failure to mail a notice of the election to ten members working on one employer site, and consequently, they were never apprised of the election and did not vote. Thus, ten members were potentially denied the right to vote in this Local Union as a result of the

failure to mail notice of the election as required by Section 401(e) of the Act. In arriving at this figure of ten, we would note, however, that since only nine of the seventeen members at the other employer location voted, it seems highly unlikely that all ten members would have voted in the election had they been notified.

(2) *Local Union 2789*

The files indicate that Local Union 2789 voted at its monthly membership meeting not to conduct an election because of a lack of funds. Accordingly, no election was conducted. However, since the Local Union was obligated by law to conduct an election, it was concluded that the total membership of 249 were potentially denied the right to vote in violation of Section 401(a) of the Act. As noted above, in computing the total number of votes that may have been affected by this violation, we have included the entire membership of the Local Union, and have further assumed that the entire membership may have voted for Mr. Bachowski.

(3) *Local Union 3186*

This Local Union failed to provide adequate safeguards to insure a fair election. For example, the persons conducting the election hand-carried ballots to members at their work stations, who were then permitted to vote. There was no specific voting area and no voter eligibility list was used. The entire

conduct of this election left a great deal to be desired. It was thus concluded that the Local Union failed to provide adequate safeguards to insure a fair election and that this violation "may have affected the outcome" of the election to the extent of 16 votes. This figure of 16 votes represents the entire margin by which Kluz prevailed over Bachowski.

(4) *Local Union 3713*

The investigation of this Local Union disclosed very loose ballot control (many ballots were found lying around the grounds of the employer), and as a result the Local was unable to account for 39 ballots. The union thus failed to provide adequate safeguards to insure a fair election and this violation "may have affected" 124 votes. This figure, as in the previous Local, represents the full margin of victory by Kluz over Bachowski.

(5) *Local Union 7496*

This Local Union, which is comprised of six members, failed to conduct an election. Our investigation disclosed that these members were eligible to vote in the election and thus, the six members were denied the right to vote in violation of Section 401(e) of the Act. For purposes of possible effect on outcome, it is assumed that all six members would have voted had an election been conducted and that all six members would have voted for Bachowski.

(6) *Local Union 7749*

This Local Union, consisting of 25 members, failed to schedule and conduct an election. Although there appeared to be voter apathy in this Local Union, it was concluded that these 25 members had been denied the right to vote. Hence, the figure of 25 was assigned as the potential "effect on the outcome."

(7) *Local Union 12055*

The 51 members of this Local Union work at four separate employer locations. The investigative files indicated that 38 members at three of those sites were not notified of the election in violation of Section 401(e) of the Act. In addition, the investigation disclosed that ballots were distributed and received in such a manner that secrecy could not be maintained. All 13 members voting at this location cast their ballots in favor of Kluz and thus it was considered that these 13 ballots may have been affected as a result of this violation. Thus, in this Local Union, a total potential effect on outcome of 51 votes was derived by assuming that the 38 members not notified would all have voted and cast their ballots in favor of Bachowski, and that the 13 members were influenced by the non-secret conditions to vote for Kluz.

(8) *Local Union 12059*

This Local Union consists of approximately 185 members employed at two separate locations. The

investigation revealed that nine members at one of these locations were not mailed notices of the election as required. The file further revealed that these members were in fact eligible to vote. Thus, it was concluded that the outcome of this election may potentially have been affected to the extent of eight votes as a result of this violation, since one of the nine members who was not notified of the election actually voted.

(9) *Local Union 13972*

The investigative file disclosed that five members of this Local Union who were working at a plant site removed from the remainder of the local members were denied an opportunity to vote in this election. The files disclosed that the Election Committee failed to provide facilities for these members. Thus, five votes may have been affected by the violation in this Local Union.

(10) *Local Union 14210*

A review of the investigative file in this Local Union disclosed two violations. The evidence indicated that one member was denied the right to vote; the Local failed to provide voting facilities for a member who was unable to reach the polls because of a work conflict. In addition, the evidence indicated that an ineligible member was permitted to vote in violation of Section 401(e) of the Act. Thus, two members were potentially affected by the violations that occurred in this Local Union.

(11) *Local Union 14661*

In this Local Union, the investigation revealed that certain members marked their ballots in such proximity to the registration table that secrecy of the ballot may have been compromised. The investigation also revealed evidence that one member saw how another member voted. The result in this election was Kluz 34, Bachowski 20, and Brummitt 11. The possible effect on outcome was 14, the margin of victory by Kluz over Bachowski.

(12) *Local Union 14768*

The files reveal that although an election was conducted in this Local Union, no return sheet was submitted to the International. The evidence indicated that because the Financial Secretary thought he had not conducted the election properly, he destroyed all records and did not submit a return. Thus, the 17 members casting ballots in this election were denied a right to vote in violation of Section 401(e) of the Act. (It should be noted that the union purports to have evidence of the actual return in this Local Union, which showed Kluz winning by one vote.)

(13) *Local Union 14800*

A review of the investigative files on Local 14800 revealed the existence of three violations. The evidence very strongly indicated that the local failed to provide adequate safeguards to insure a fair election in violation of Section 401(c) of the Act.

There was evidence that ballots were submitted for some 40 members who did not in fact vote in the election. Moreover, individuals other than election tellers had access to and handled ballots without adequate supervision. In view of the lack of adequate ballot control and the strong indication of ballot fraud in this Local Union, it was concluded by the Secretary that all 110 votes received by Kluz should be considered as possibly having been affected by this violation. (118 votes were cast in the election with Bachowski receiving 3 and Brummitt receiving 5.) The evidence also indicated that 78 members at three employer locations were not adequately notified of the election in violation of Section 401(e) of the Act. Since 38 of these members voted, only 40 members may be considered for purposes of effect on outcome (the 38 who voted were included in the figure of 110 above). Finally, the file disclosed that funds of Local Union 14800 were expended for a campaign rally supporting the candidacy of Mr. Kluz. Evidence tends to indicate that 50 to 100 members attended the party, including some officers and members of locals other than 14800. Thus, using maximized figures, 100 votes may have been affected by this violation (in addition to the total number of members already included above). However, we would note that the union has indicated that many members attending this party were ardent Kluz supporters. Thus, the illegal expenditure would have had little effect, if any, on their voting preference. We were unable to identify the majority of the members

of the party; the union contends that most of the members in attendance were members of Local Union 14800, whose entire vote was regarded as possibly affected by other violations as noted above.

(14) *Local Union 14820*

The investigative file in this Local Union indicated that there was a failure to maintain secrecy of the ballot in violation of Section 401(a) of the Act, as well as a failure to adequately notify members of the election in violation of Section 401(e) of the Act. The investigation disclosed that 22 ballots cast in this election were signed on the back by the voting member—an obvious violation of secrecy. Although officers of the Local claim they were not aware of this until a subsequent review of the ballots with a Department of Labor investigator, this does not cancel the violation, which may have affected 22 votes. The evidence also indicated 39 members at two employer sites were not notified of the election. Assuming that all 39 would have voted and that they would have cast their votes for Bachowski, 39 votes may have been affected by this violation. Finally, the file disclosed that through inaccurate tallies by the responsible local union officers, Bachowski received one less vote than his entitlement while Kluz received one additional vote. Hence, an extra two votes must be considered as having been affected by the Local's failure to properly credit the votes to the proper candidates.

(15) *Local Union 14945*

The investigative file in this Local Union revealed that ballots were marked on tables by voters in close proximity who were able to observe how other members were voting their ballots. Thus, the Local failed to observe secrecy of the ballot as required by Section 401(c) of the Act. Since the margin of victory by Kluz over Bachowski was 18, 18 votes may have been affected by the existence of this violation.

(16) *Local Union 15370*

This Local Union failed to provide adequate safeguards to insure a fair election in that the ballot control was less than desirable. Persons not authorized handled ballots at one or more times throughout the period of the election. Although additional investigation failed to disclose any evidence that would indicate other irregularities such as fraud or ineligible members voting, it was nevertheless concluded that this lack of adequate safeguards may have affected ten members in this local—the margin of votes achieved by Kluz over Bachowski.

(17) *Local Union 15420*

Evidence disclosed that this Local Union failed to maintain adequate safeguards to insure a fair election. Union records indicated that Kluz received 15 votes, Bachowski none, and Brummitt one. However, the Secretary's investigation revealed that only 13 members were listed as voting. It was also learned

that this local did not maintain adequate control of the ballots a fact which may in no small part account for the deviation between the number of votes indicated as having been cast and the number of members actually voting. Thus, the Secretary of Labor concluded that all 16 members voting in this election may have been affected by the local's failure to provide adequate safeguards to insure a fair election.

To recapitulate, we are setting forth below a list of the Locals in which violations occurred and the votes which may potentially have been calculated to a theoretical probability and represent the maximum number of votes involved.

1. Local Union 2203 — 10 votes
2. Local Union 2789 —249 votes
3. Local Union 3186 — 16 votes
4. Local Union 3713 —124 votes
5. Local Union 7496 — 6 votes
6. Local Union 7749 — 25 votes
7. Local Union 12055— 51 votes
8. Local Union 12059— 8 votes
9. Local Union 13972— 5 votes
10. Local Union 14210— 2 votes
11. Local Union 14661— 14 votes
12. Local Union 14768— 17 votes
13. Local Union 14800—250 votes
14. Local Union 14820— 63 votes
15. Local Union 14945— 18 votes
16. Local Union 15370— 10 votes
17. Local Union 15420— 16 votes

By adding the total of the votes set forth in the local unions above, the election for the position of District Director, District 20, may theoretically have been affected by violations disclosed through investigation to the extent of 884 votes. Since the margin of victory by which Mr. Kluz prevailed over Mr. Bachowski was 907 votes [2] it was the Secretary of Labor's conclusion that the violations which occurred could not have affected the outcome of the election. Moreover, we would note the Secretary like any other litigant must be cognizant of all factors entering into prosecution of a Title IV case. In this regard, the union has raised serious question concerning Bachowski's invocation of his internal union remedies, notably his failure to carry a complaint to the International Tellers whose function is to rule initially upon the validity of election protests. Mr. Bachowski chose to bypass this step and to carry his protest directly to the Executive Board.

The plaintiff has correctly alleged in this complaint and the Secretary has confirmed through investigation, that certain violations of Title IV occurred in the election for District Director for District 20. However, the Secretary concluded, after review of the investigative findings that the votes which may have been affected by the violations could not have altered the outcome of the election. In *Wirtz* v. *Local 153*,

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[2] The results in the election for the position of District Director, District 20 were as follows: Kluz—10,558 votes; Bachowski—9,651 votes; Brummitt—3,566 votes.

Glass Bottle Blowers Association, 389 U.S. 463 (1968) the Supreme Court noted at page 427 that:

> The Secretary may not initiate an action until his own investigation confirms that a violation of section 401 *probably infected* the challenged election. (Emphasis added).

Thus, the finding of violations by the Secretary of Labor does not mature into an actionable case unless he has evidence that such violations "probably infected" the election in question. In this case, the Secretary found violations, but concluded that they did not affect the outcome of the election.

CONCLUSION

The extensive investigation conducted by the Department of Labor focused, among other things, on all the specific matters raised by Mr. Bachowski. As has been shown above, certain violations were disclosed in the conduct of this election, however, these violations could not have affected its outcome. Therefore, it is submitted that the Secretary of Labor in arriving at his determination not to file suit to set aside the District 20 election properly discharged his statutory duties under Title IV of the Act.

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-466

PETER J. BRENNAN, SECRETARY OF LABOR,
Petitioner,

v.

WALTER BACHOWSKI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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INDEX

Page

ARGUMENT

Introduction and Summary 2

I. THE LMRDA PRECLUDES JUDICIAL REVIEW OF THE SECRETARY OF LABOR'S DECISION THAT "PROBABLE CAUSE" DOES NOT EXIST FOR BRINGING A TITLE IV ACTION. TO HOLD OTHERWISE WOULD UNDERMINE INTERESTS WHICH CONGRESS DEEMED PARAMOUNT 3

1. The Burden of Defense 6

2. The Cloud on the Incumbent's Title to Office 8

II. JUDICIAL REVIEW OF THE SECRETARY'S DECISION NOT TO BRING A TITLE IV ACTION WOULD CONTRAVENE ARTICLES II AND III OF THE CONSTITUTION 9

1. Separation of Powers 9

2. Adversity of Interest 12

CONCLUSION 13

TABLE OF CITATIONS

Cases:

Adams v. *Richardson*, 480 F.2d. 1159 (D.C. Cir., 1973) 9

Calhoon v. *Harvey*, 379 U.S. 134 (1964) 3, 4, 6, 11, 13

Fuller v. *Volk*, 351, F.2d. 323 (3rd Cir., 1965) 13

Goldberg v. *Hoffman*, 225 F.2d. 463 (7th Cir., 1955) 10

Hecht Co. v. *Bowles*, 321 U.S. 321 (1944) 11

Inmates of Attica Correctional Facility v. *Rockefeller*, 477 F.2d. 375 (2nd Cir., 1973) 10, 11

National Woodwork Mfrs. Assn. v. *NLRB*, 386 U.S. 612 (1967) .. 5

Newman v. *United States*, 382 F.2d. 479 (D.C. Cir., 1967) 10

Peek v. *Mitchell*, 419 F.2d. 575 (6th Cir., 1970) 10

San Diego Building Trades Council v. *Garmon*, 359 U.S. 236 (1959) 6

	Page
Smith v. *United States*, 375 F.2d. 243 (5th Cir., 1967), cert. denied, 389 U.S. 841 (1967)	10
Trbovich v. *Mine Workers*, 404 U.S. 528 (1972)	2, 3, 4, 5, 7, 13
United States v. *Cox*, 342 F.2d. 167 (5th Cir., 1965)	10
United States v. *Johnson*, 319 U.S. 302 (1943)	12
Vaca v. *Sipes*, 386 U.S. 171 (1967)	2, 5
Valenta v. *Brennan*, Civ. Ac. No. C-74-11 (N.D. Ohio, Eastern Div.)	6
Wirtz v. *Glass Bottle Blowers*, 389 U.S. 463 (1968)	3, 5, 8, 11
Wirtz v. *Hotel Employees*, 391 U.S. 492 (1968)	11

Constitutional Provisions and Statutes

Administrative Procedure Act, 5 U.S.C. §701(a)(1)	2
Labor Management Reporting and Disclosure Act: Title IV, 29 U.S.C. §481-483:	
Section 402, 29 U.S.C. §482	3, 8, 11
Section 403, 29 U.S.C. §483	3
National Labor Relations Act, 29 U.S.C. 151, *et seq.*	5
United States Constitution:	
Article II	2, 9, 10, 11
Article III	2, 3, 9, 12

Miscellaneous

Hart & Wechsler, *The Federal Courts and the Federal System*, (1st Ed. 1953)	13
3B Moore's Federal Practice (2nd Ed. 1974), Par. 24.16[2], page 24-612	13
S. Rep. No. 187, 86th Cong., 1st Sess. (1959)	8

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-466

PETER J. BRENNAN, SECRETARY OF LABOR,
Petitioner,

v.

WALTER BACHOWSKI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR UNITED STEELWORKERS OF AMERICA, AFL-CIO

United Steelworkers of America, AFL-CIO ("USWA") is a party herein pursuant to this Court's Rule 21(4).[1] USWA agrees with petitioner that the decision below is wrong and should be reversed.

Because petitioner's brief will set forth the opinions below, jurisdiction, question presented, statutes involved, and statement of the case, we shall refrain from duplicating

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[1] USWA was a co-defendant with the Secretary of Labor in the district court, and was an appellee in the court below.

that effort. Our brief will focus upon the error of the decision below as seen from the special vantage point of a union whose elections are regulated by Title IV.

ARGUMENT

Introduction and Summary

The issue in this case is whether the Secretary of Labor's decision not to file an action under Title IV of the LMRDA, based upon his finding that there is not probable cause to believe there were violations which may have affected the outcome of a union election, is subject to judicial review under the Administrative Procedure Act. USWA, in agreement with the Secretary, contends that the Secretary's decision falls within the exception to judicial review articulated in 5 U.S.C. §701(a)(1), i.e., that the LMRDA precludes judicial review. Additionally, USWA believes that the contrary holding of the court below collides with well-established Constitutional principles.

In Part I, we show that Congress conferred exclusive enforcement authority upon the Secretary, deliberately rejecting proposals which would have vested some power of suit initiation in union members; that this Court's decision in *Trbovich* v. *Mine Workers,* 404 U.S. 528 (1972), conclusively establishes that in light of that Congressional plan the Secretary's decision not to sue cannot be judicially challenged; and that to permit such challenges would undermine interests which Congress deemed paramount. Cf. *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967) (decision whether or not to issue unfair labor practice complaints is committed to the "unreviewable discretion" of the NLRB's General Counsel).

In Part II, we show that judicial review is inappropriate for another reason, i.e., that it would contravene Articles II and III of the Constitution. This is so for two reasons: (1) The decision whether to institute litigation to enforce federal law is one which Article II vests exclusively in the

Executive branch. For the judiciary to direct the Executive to bring cases to it would violate the doctrine of separation of powers. (2) The remedy sought, should a court determine that the Secretary's failure to sue was arbitrary and capricious, is an order directing the Secretary to institute a Title IV action against the union. But as the Secretary and the union both agree that Title IV does not require a new election, there would be no adversity of interest between the plaintiff and defendant in such a suit, and thus no "case" or "controversy" as required by Article III of the Constitution.

I. THE LMRDA PRECLUDES JUDICIAL REVIEW OF THE SECRETARY OF LABOR'S DECISION THAT "PROBABLE CAUSE" DOES NOT EXIST FOR BRINGING A TITLE IV ACTION. TO HOLD OTHERWISE WOULD UNDERMINE INTERESTS WHICH CONGRESS DEEMED PARAMOUNT.

There can be no doubt that Congress intended that only the Secretary of Labor, and not losing candidates, would be authorized to sue to enforce Title IV. Section 402, 29 U.S.C. §482, creates a cause of action in the Secretary alone. Section 403, 29 U.S.C. §483, makes "suit by the Secretary the 'exclusive' post-election remedy for a violation of Title IV. This Court has held that §403 prohibits union members from initiating a private suit to set aside an election. *Calhoon* v. *Harvey,* 379 U.S. 134, 140 (1964)." *Trbovich* v. *Mine Workers,* 404 U.S. 528, 531 (1972).

Congress had before it competing bills, some of which would have authorized union members to sue to enforce Title IV, but in final conference the two houses opted for the Senate's approach, which vested exclusive enforcement authority in the Secretary. *Trbovich, supra,* 404 U.S. at 533-536; *Wirtz* v. *Glass Bottle Blowers,* 389 U.S. 463, 473 (1968); *Calhoon, supra,* 379 U.S. at 140. "It is apparent that Congress decided to utilize the special knowledge and

discretion of the Secretary of Labor in order best to serve the public interest." *Calhoon, supra,* 379 U.S. at 140.

The present case is controlled by *Trbovich*. Trbovich sought to assert, as intervenor, two grounds for setting aside the Mine Workers' election, in addition to the grounds advanced by the Secretary. His brief to this Court described these two grounds at length, and although the phrase "arbitrary and capricious" was not used in characterizing the Secretary's failure to assert them, the brief left no doubt that he believed the failure to be a gross act of misfeasance by the Secretary.[2] This Court did *not* hold that Trbovich would be entitled to have these grounds asserted if he could establish that the Secretary's failure to do so was arbitrary and capricious. Rather, this Court held flatly that the Secretary's decision not to assert them was dispositive, 404 U.S. at 536, 537:

> "[T]he legislative history supports the conclusion that Congress intended to prevent members from pressing claims *not thought meritorious by the Secretary* . . . .
>
> * * * * *
>
> These are claims that the Secretary has presumably determined to be without merit. Hence, to require the union to respond to these claims would be to circumvent the screening function assigned to the Secretary. We recognize that it is less burdensome for the union to respond to new claims in the context of the pending suit than it would be to respond to a new and independent complaint. *Nevertheless, we think Congress intended to insulate the union from any complaint that did not appear meritorious to both a complaining member and the Secretary of Labor.*" (Emphasis added.)

The present case is, of course, *a fortiorari* from *Trbovich,* for here there is not a "pending suit," and the effect of

[2] See Brief for Petitioner in *Trbovich,* pp. 12-19, 40, 42-43.

plaintiff's efforts, if successful, would be to subject the union "to a new and independent complaint."

In upholding this suit, the court below relied upon precedents outside the labor field. That reliance is misplaced, for the Congressional path to enactment of labor legislation is unique. As this Court has said of both the LMRDA and the National Labor Relations Act, each is "the product of conflict and compromise between strongly held and opposed views, and its proper construction frequently requires consideration of its wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve." *Wirtz* v. *Glass Bottle Blowers,* 389 U.S. 463, 468 (1968); *cf. National Woodwork Mfrs. Assn.* v. *NLRB,* 386 U.S. 612, 619 (1967). Thus the question whether labor legislation precludes judicial review is not one which can be answered by analogies from non-labor fields.

It *is* appropriate, however, to look for guidance to the NLRA, for this Court has already recognized that the enforcement schemes of the NLRA and Title IV of the LMRDA are "analogous", *Wirtz* v. *Laborers' Union,* 389 U.S. 477, 483 (1968), a judgment in which counsel for respondent concurs.[3] In *Vaca* v. *Sipes,* 386 U.S. 171, 182 (1967), this Court held that the decision whether or not to

[3] In his brief for the petitioner in *Trbovich,* p. 38, n. 17, counsel for the respondent herein noted the "striking parallel between the NLRA enforcement mechanism for remedying unfair labor practices, and the enforcement scheme under Title IV of the LMRDA." To be sure, that brief went on to argue that the Secretary of Labor's decision not to bring a Title IV action is reviewable, but only by drawing the wrong analogy. Instead of comparing the Secretary's role under Title IV to that of the NLRB's General Counsel in deciding whether to issue unfair labor practice complaints, the brief compared the Secretary's role to that of the NLRB in deciding to seek enforcement after it has rendered a decision on the merits following full adjudication. *Ibid,* and text thereat. Even then, the brief failed to justify its implicit assumption that judicial review is available over an NLRB decision not to institute enforcement proceedings in the courts of appeals.

issue unfair labor practice complaints is committed to the "unreviewable discretion" of the NLRB's General Counsel."[3a]

What we have said thus far is, we believe, sufficient to demonstrate the incorrectness of the decision below. That conclusion becomes even more obvious, however, upon examination of the ways in which the decision below would undermine interests which Congress deemed paramount.

The potential impact of the decision below must be assessed with a realization that the judicial door there opened is likely to have many entrants. While there will be few cases in which a losing candidate could entertain any realistic hope of overturning the Secretary's decision as "arbitrary and capricious," there are other reasons why such a suit will seem attractive. The realities of union politics being what they are, a defeated candidate often looks for dramatic ways to launch his *next* compaign for union office. Filing a lawsuit contending that he was "robbed" in the last election is a highly effective campaign technique, one which is likely to garner considerable publicity and secure media dissemination of his unproved allegations of election misconduct.

The potential effects thus must be evaluated on the assumption that such suits will be numerous.[4] In two important respects, the decision below undermines objectives which Congress sought to achieve: it puts unions to the burden of defending lawsuits deemed unmeritorious by the Secretary, and it casts a cloud over incumbents' titles to office.

1. The Burden of Defense

As this Court has recognized, one of Congress' objectives in giving the Secretary exclusive enforcement authority was

[3a] Cf. *Calhoon, supra,* at p. 140, where this Court analogized the Secretary's "discretion" to that of the NLRB as articulated in *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 263, 242 (1949).

[4] Of the four complaints relating to the Steelworkers' 1973 election which the Secretary found unmeritorious, two have resulted in member suits challenging the Secretary's finding as arbitrary and capricious. In addition to the instant case, see *Valenta* v. *Brennan,* Civ. Ac. No. C-74-11 (N.D. Ohio, Eastern Div.).

"to protect unions from frivolous litigation and unnecessary judicial interference with their elections." *Trbovich, supra,* 404 U.S. at 532. While at first blush it might seem that the decision below poses little threat to these interests, as the suit can be structured so that the member and the Secretary are the only parties,[5] a closer look demonstrates the fallacy of this analysis. In reality the union *must* participate in the member's suit against the Secretary, intervening for that purpose if it is not named as a defendant originally. For the member's suit will always be the critical litigation stage. If the member prevails in that suit, he will obtain a judicial declaration that the Secretary's conclusion that there were not serious violations was not only wrong, but so wrong as to be "arbitrary and capricious." The Secretary will then be required to institute an action against the union in that same court. Realistically, what chance would the union have at that stage to vindicate its election? The election's demise would be virtually a foregone conclusion.

The decision below effectively reinstates the member's right to bring Title IV actions which Congress so clearly opted to deny. Every losing candidate in every election will have the right to bring such an action. The only difference will be a greater burden of proof: he will have to demonstrate that the Secretary's conclusion is arbitrary and capricious. But the mechanics of the suit—discovery, trial, and the consequent drain upon the union treasury—will be the same.[6]

The further steps in the instant litigation, following the issuance of the decision below (which was not stayed), confirm this analysis. The Secretary submitted a statement

[5] But *cf.* the instant case, wherein the plaintiff named the union as a defendant.

[6] Indeed, if the union persists in defending the Secretary's suit after a court has ordered it brought, the drain on the union treasury will have been doubled.

explaining at length why he had concluded that there were not violations which may have affected the outcome. Plaintiff's counsel thereupon notified defendants that this statement "is totally inadequate" and that he intends "to take the deposition of various persons from the Labor Department in an effort to properly place before the Court all of the facts involved." Obviously, the parties will fully litigate this case just as they would have had Congress directly conferred the right to sue upon union members.

2. The Cloud on the Incumbent's Title to Office

Congress was acutely sensitive to the danger that Title IV might create instability in union governance. In shaping Title IV's enforcement machinery, one of Congress' objectives was "to settle as quickly as practicable the cloud on the incumbents' title to office . . ." *Wirtz* v. *Bottle Blowers Association,* 389 U.S. 463, 468-469, n. 7 (1968). Congress recognized that uncertainty as to union leadership "may keep a union in a state of turmoil and could result in instability in collective bargaining relationships with employers", S. Rep. No. 187, 86 Cong., 1st Sess. (1959), p. 22; and it feared that the resultant "internal problems" might lead to "tensions with the surrounding community," *id.,* p. 5.[7]

The decision below will both broaden and lengthen the clouds over title to union office. It will broaden them by multiplying the number of union officers whose elections are cast in doubt by the pendency of litigation. It will lengthen them because the candidate's suit, which will not be filed until after the Secretary has completed his investi-

[7] The Senate Report cautioned that "time is of the essence" in settling Title IV disputes. S. Rep. No. 187, 86th Cong., 1st Sess. 21 (1959). To that end, Congress specified time limits both for the filing of members' complaints with the Secretary, 29 U.S.C. §482(a), and for the institution of lawsuits by the Secretary when he finds such complaints meritorious, 29 U.S.C. §482(b).

gation and decided not to sue, will come later and, because of its two-lawsuit path to ultimate resolution, last longer.

The divergence between Congress' objectives and the results likely to flow from the decision below is thus further evidence that the decision below is erroneous.

II. JUDICIAL REVIEW OF THE SECRETARY'S DECISION NOT TO BRING A TITLE IV ACTION WOULD CONTRAVENE ARTICLES II AND III OF THE CONSTITUTION.

A wholly separate reason why the decision below must be reversed is that Articles II and III of the Constitution do not countenance a court order requiring the executive branch, against its wishes, to institute a lawsuit in federal court. Article II vests in the executive branch the final responsibility for determining what court actions will be brought to enforce federal law, and thus a judicial direction that such an action be brought would violate the separation of powers. Moreover, because the Secretary agrees with the union that Title IV does not require a new election, the lawsuit would be one lacking the requisite adversity of interest to constitute a "case" or "controversy" as required by Article III.

1. Separation of Powers

We are aware of no case, and the decision below cites none, in which an executive branch decision not to institute court proceedings has been held reviewable under the APA.[8] That absence is not accidental. Whenever such review has been sought, the courts have declared that to do so would contravene the separation of powers.

[8] The court below cited *Adams* v. *Richardson,* 480 F. 2d 1159 (D.C. Cir., 1973), as a case in which a Government official's refusal to enforce a statute was held reviewable. But in *Adams* the method of enforcement which HEW was ordered to pursue was an internal administrative proceeding, and the Court emphasized that what it was directing was a "process which . . . will . . . pass beyond the District Court's continuing control and supervision," *Id.* at 1163, n. 5. The *Adams* court accordingly had no occasion to discuss constitutional inhibitions upon its power to direct the filing of a lawsuit.

Article II, Section 3 of the Constitution charges the President of the United States with the duty to "take care that the laws be faithfully executed. . . ." For a federal court to direct the executive branch to file a lawsuit which it did not wish to bring would usurp executive authority. This principle was explained by the Chief Justice (then a Judge on the Court of Appeals) in *Newman* v. *United States,* 382 F.2d 479, 482, n. 9 (D.C. Cir. 1967):

> "The concurring opinion would reserve judicial power to review 'irrational' decisions of the prosecutor. We do our assigned task of appellate review best if we stay within our limits, recognizing that we are neither omnipotent so as to have our mandates run without limit, nor omniscient so as to be able to direct all branches of government. The Constitution places on the Executive the duty to see that the 'laws are faithfully executed' and the responsibility must reside with that power."

The *Newman* court recognized that an executive decision not to institute suit "is subject to abuse or misuse just as is judicial discretion." *id.* at 482, but it concluded that the sanction for such abuse rests not with the judiciary, but in the President's power to supervise and discipline his subordinates, *ibid.*[9]

The court below distinguished these decisions because they involved the enforcement of criminal laws. The court concluded that the Secretary lacks the "prosecutorial discretion" enjoyed by the executive branch in its enforcement of criminal laws. While that conclusion may be incorrect,[10] we assume *arguendo* that the Secretary's discretion *is* more limited, i.e., that he does not have discretion, as a prosecutor does, to refrain from bringing enforcement proceedings when he finds probable cause to believe that a valid lawsuit exists. Even on that assumption, the constitutional implications remain the same. There can be no more direct invasion of the doctrine of separation of powers than the judiciary's compelling the executive to bring cases before it for decision. The court would become both prosecutor and judge, deciding what allegations are to be asserted in the complaint and then passing judgment upon the merit of those allegations.

[9] Accord: *Inmates of Attica Correctional Facility* v. *Rockefeller,* 477 F.2d 375, 379-380 (2nd Cir., 1973); *Peek* v. *Mitchell,* 419 F.2d 575, 577 (6th Cir., 1970); *Smith* v. *United States,* 375 F.2d 243, 247 (5th Cir., 1967), cert. denied, 389 U.S. 841, (1967); *United States* v. *Cox,* 342 F.2d 167, 171 (5th Cir., 1965); *Goldberg* v. *Hoffman,* 225 F.2d 463, 464-465 (7th Cir., 1955).

At the very least, the decision whether to institute a Title IV action depends upon the exercise of a variety of judgmental factors: assessing the facts and evaluating whether there is sufficient evidence to establish a violation, predicting the resolution of difficult questions of statutory interpretation, and assessing whether violations may have affected the outcome of the election. As to all of these, "Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest." *Calhoon, supra,* 379 U.S. at 140. Article

[10] The court below relied upon the literal language of Section 402, which states that when the Secretary finds probable cause he "shall" institute a lawsuit. But the cases are legion in which courts have concluded that the word "shall" does not preclude the normal exercise of discretion. See, e.g., *Hecht Co.* v. *Bowles,* 321 U.S. 321 (1944); *Inmates of Attica Correctional Facility* v. *Rockefeller,* 477 F.2d 375, 381 (2nd Cir. 1973), and cases cited thereat. This Court has characterized the very statutory provision in the LMRDA upon which the court below relied as meaning that the Secretary, upon finding probable cause, "*may* file suit." *Calhoon, supra,* 379 U.S. at 140. See also *Wirtz* v. *Hotel Employees,* 391 U.S. 492, 498 (1968) ("Congress . . . settled enforcement authority on the Secretary of Labor to insure that *serious* violations would not go unremedied"); *Wirtz* v. *Glass Bottle Blowers, supra,* 389 U.S. at 468.

II does not permit the judiciary to substitute itself in making these "prosecutorial" decisions.

The incongruity of the decision below is heightened by the additional fact, which we next discuss, that in a lawsuit which the court orders to be brought there will be no adversity of interest between the plaintiff and the defendant, but only between the court and the parties.

2. Adversity of Interest

Respondent seeks a court order compelling the Secretary to institute a Title IV action against the union. But the Secretary, after thorough investigation, has concluded that such a lawsuit would be without merit. If respondent prevailed, therefore, the consequence would be a second lawsuit in which both the plaintiff (the Secretary) and the defendant (the union) agree that the defendant deserves to win. It takes no citation of authority to recognize that such a suit would not meet the Constitution's "case or controversy" requirement: there would be no adversity between the parties.[11]

Of course, if the losing candidate were to intervene in the suit which the Secretary was ordered to file against the union, he could supply the adversity of interest which is lacking between the original parties. But that would not cure the Article III defect. Adversity must exist between the original parties. That lacking, the suit must be dismissed, *United States* v. *Johnson,* 319 U.S. 302 (1943),[12] and the putative intervenor must avail himself of such independent judicial remedies as he himself possesses. Here,

[11] This is made no less true because the court might reject the positions of both plaintiff and defendant and set the election aside. See, p. 7, *supra.* Adversity between the court and the parties is not the Constitutional touchstone for federal jurisdiction.

[12] In *Johnson,* the plaintiff and defendant agreed that a federal statute was unconstitutional, but the United States intervened in the district court to defend the constitutionality of the statute. Although the intervenor thus supplied the adversity which was lacking between the original parties, the Supreme Court dismissed for want of adversity.

of course, he has none, for Congress intentionally decided that candidates should not be empowered to invoke the jurisdiction of the federal courts to hear such controversies.

All of this demonstrates, in yet another way, that candidates cannot secure by indirection that which Congress denied them directly: a cause of action to enforce Title IV.

CONCLUSION

For the foregoing reasons, the decision below should be reversed, and this Court should remand with instructions that the complaint be dismissed for failure to state a claim.

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Cf. Hart & Wechsler, *The Federal Courts and the Federal System* (1st Ed. 1953), page 116, note 1. This was but one application of the general rule that "intervention will not serve as a means of conferring real jurisdiction." 3B Moore's Federal Practice (2nd Ed. 1974), Par. 24.16[2], page 24-612 and n. 6 thereat. It has been held that where jurisdiction is lacking between the original parties a court has "discretion to treat the pleading of an intervenor as a separate action in order that it might adjudicate the claims [of] the intervenor." *Fuller* v. *Volk,* 351 F.2d 323, 328-329 (3rd Cr., 1965). Such discretion exists, however, only "in a case in which it appears that the intervenor has a separate and independent basis for jurisdiction." *Ibid.* Union members, of course, do not have a "separate and independent basis" for challenging union elections under Title IV. *Calhoon, supra; Trbovich, supra.* Thus their intervention in a non-adversary Title IV action would not cure the jurisdictional defect.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-466

PETER J. BRENNAN, SECRETARY OF LABOR, *Petitioner,*

v.

WALTER BACHOWSKI, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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INDEX

Page

COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW .. 1

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. JUDICIAL REVIEW IS THE RULE AND ADMINISTRATIVE DISCRETION ABSOLUTELY IMMUNE FROM REVIEW IS A NARROW EXCEPTION TO BE DEMONSTRATED BY CLEAR CONGRESSIONAL INTENT 8

II. THE LANGUAGE, HISTORY AND PURPOSE OF TITLE IV OF LMRDA REINFORCE RATHER THAN REBUT THE APPLICABILITY HERE OF THE GENERAL RULE OF JUDICIAL REVIEW 10

III. NONE OF THE SECRETARY'S CONTENTIONS AFFORD ANY BASIS FOR AVOIDING THE GENERAL RULE OF JUDICIAL REVIEW OF ARBITRARY ADMINISTRATIVE ACTION 15

1. The "Exclusive Remedy" Provision of Section 403, 29 U.S.C. 483, Does not Indicate any Exception to the Usual Concepts of Judicial Review 15

2. The Secretary's "Screening Role" Under Title IV Does not Establish Immunity From Review 17

3. The Assertion That Judicial Review Might Preclude Settlements Between the Secretary and the Offending Union Does not Support Absolute Discretion in the Secretary 19

4. The "60-day Provision" does not Establish Immunity From Review 20

5. The Secretary's Decision under Title IV Is Not Immune from Review as an Exercise of Prosecutorial Discretion 21

Page

6. The Weight of Authority Recognizes That Review of the Secretary's Decision not to Bring Suit is Consistent with Title IV 24

CONCLUSION 29

TABLE OF CITATIONS

CASES:

Abbott Laboratories v. *Gardner*, 387 U.S. 136 (1967) .. 9
Adams v. *Richardson*, 480 F. 2d 1159 (C.A.D.C., 1973) . 24
Altman v. *Wirtz*, 56 LRRM 2651 (D.D.C. 1964) 27
Barlow v. *Collins*, 397 U.S. 159 (1970) 9
Brennan v. *Silvergate District Lodge No. 50*, 503 F.2d 800 (C.A. 9, 1974) 27
Brennan v. *United Steelworkers of America and Edward Sadlowski*, Civil Action No. 73-0957-B (W.D. Pa.) 2
Calhoon v. *Harvey*, 379 U.S. 134 (1964) 19
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402 (1971) 9
DeVito v. *Shultz*, 300 F.Supp. 381 (D.D.C. 1969) 24, 25, 27-28
Hodgson v. *International Printing Press & Assist. Union*, 440 F. 2d 1113 (C.A. 6, 1971) 20, 21
Hodgson v. *Local 851*, IAM, 454 F. 2d 545 (C.A. 7, 1971) 20, 27
Honda v. *Clark*, 386 U.S. 484 (1967) 12
Howard v. *Hodgson*, 490 F. 2d 1194 (C.A. 8, 1974) .. 22, 26
International Union, UAW v. *Scofield*, 382 U.S. 205 (1965) 12, 20
Jacob Siegel Co. v. *Federal Trade Commission*, 327 U.S. 608 (1946) 8
Katrinic v. *Wirtz*, 62 LRRM 2557 (D.D.C. 1966) 27
Leedom v. *Kyne*, 358 U.S. 184 (1958) 9
Office of Communication v. *Federal Communications Commission*, 359 F. 2d 994 (C.A.D.C., 1966) 29

Page

Ravaschieri v. *Schultz*, 75 LRRM 2272 (S.D.N.Y. 1970) 28
Schonfeld v. *Wirtz*, 258 F. Supp. 705 (S.D.N.Y. 1966) 21, 26
Seminole Nation v. *United States*, 316 U.S. 286, 296 (1942) 12
Smith v. *Local 25, Sheet Metal Workers Int. Assn.*, 500 F. 2d 741 (C.A. 5, 1974) 23
Squire v. *Capoeman*, 351 U.S. 1 (1956) 12
Trbovich v. *United Mine Workers*, 404 U.S. 528 (1972) 7, 12, 13, 15, 16, 17
United States v. *Arenas*, 158 F. 2d 730 (C.A. 9, 1946) .. 12
United States v. *Pierce Auto Lines*, 327 U.S. 515 (1946) 8
Vaca v. *Sipes*, 386 U.S. 171 (1967) 23
Wirtz v. *Independent Workers Union*, 65 LRRM 2104 (M.D.Fla., 1967) 21
Wirtz v. *Local 153, Glass Bottle Blowers Assn.*, 389 U.S. 463 (1968) 19
Wirtz v. *Local Union 1622*, 285 F. Supp. 455 (N.D. Calif. 1968) 21

STATUTES:

Administrative Procedure Act
5 U.S.C. 701(a)(1) 8
5 U.S.C. 701(a)(2) 9
5 U.S.C. 702 8
5 U.S.C. 706 8

Labor Management Reporting and Disclosure Act of 1959
Section 210 10
Section 402 ..... 10, 20, 25
Section 403 ..... 10, 11, 13, 14, 15, 16

National Labor Relations Act 22, 23

Rule 24(a), Federal Rules of Civil Procedure 15, 16

Page

MISCELLANEOUS:

104 Cong. Rec. 10947 (1958) 11

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---

BRIEF FOR THE RESPONDENT

COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the determination of the Secretary of Labor not to bring suit under Title IV of the Labor-Management Reporting and Disclosure Act of 1959 to upset a challenged union election is beyond the scope of permissible judicial review even if such determination is arbitrary and capricious in that the Secretary's own investigation showed that violations of Title IV had affected the outcome of the election.

COUNTERSTATEMENT OF THE CASE

Respondent Walter Bachowski was a candidate for the office of District Director of District 20 of the United Steelworkers of America in an election held on

February 13, 1973 (App. 3A-4A). Running against the incumbent District Director (App. 4A), Respondent Bachowski had the full power of the "official family" of the Union against him,[1] as well as the large majority of the appointed staff men (App. 4A). Nevertheless, by the Steelworkers' own count, Respondent's defeat was by the narrow margin of 907 votes out of approximately 24,000 votes cast (App. 4A). After exhausting intra-union remedies before the very "official family" which had opposed his election (App. 4A), Respondent complained to the Secretary of Labor, June 21, 1973 (App. 4A), and attached a detailed STATEMENT IN SUPPORT OF CONTEST containing evidence of substantial wrongdoing in violation of the Steelworkers' constitution and of Title IV, LMRDA, which affected the election outcome.[2] The Secretary, without providing Respondent with any reason whatever, refused to bring suit to upset the election (App. 5A). After the present suit against the Secretary was filed, Respondent received a letter from the De-

[1] I. W. Abel, President of the Steelworkers, testified in another suit growing out of the February 13, 1973 election that the Union's "official family," consisting of the three International Officers and the District Directors, automatically supports the incumbents against any challenger with financial, legal and other assistance. *Brennan* v. *United Steelworkers of America and Edward Sadlowski*, Civil Action No. 73-0957-B (W.D.Pa.), deposition August 15, 1974, pp. 6, 7, 11, 12, 13, 15, 16. Thus, the incumbent in this case had the support of the Union's "official family" not only during the election campaign and the intra-union proceedings thereafter, but most importantly, for purposes of this case, *to persuade the Secretary not to bring suit*. And the intensity of the official family's feelings against any action whatever by the Secretary is illustrated by Mr. Abel's testimony that a union member who challenges an incumbent and loses should not appeal to the Government under LMRDA "even though there was ballot box stuffing" (Id. at pp. 37-38).

[2] Respondent has lodged this detailed STATEMENT IN SUPPORT OF CONTEST with the Clerk of this Court.

partment of Labor stating only that "civil action to set aside the challenged election is not warranted." See, *infra,* p. 1a.

On November 7, 1973, Respondent brought the present suit, naming the Secretary and the Union as defendants (App. 1A). Respondent alleged violation of the statute and the Union's Constitution as follows (App. 5A):

> "A. Section 401(A) of the Act, failed to elect by secret ballot in that many members were required or permitted to vote in such a manner that a member voting could be identified with the choice expressed.
>
> B. Section 401(C) of the Act, Union failed to provide adequate safeguards and denied the plaintiff the right to have observers at polling places and at the counting of the ballots.
>
> C. Section 401(E) of the Act, the Defendant Union violated its own Constitution, it denied members the right to vote without fear of reprisal, interference or penalty, and members were denied the right to vote in that elections were not conducted in at least one local.
>
> D. Section 401(G) in that the Defendant USWA used money received as dues and assessments to promote the candidacy of the plaintiff's opponent the incumbent Kay Kluz."

Respondent's verified Complaint goes on with this particularly significant allegation (App. 5A):

> "18. Notwithstanding the fact that the Defendant Secretary's investigation has substantiated the plaintiff's allegations and notwithstanding the fact that the irregularities charged affected the outcome of the election the Defendant Secretary refuses to file suit to set aside the election."

On the basis of the above allegations that the Secretary's own investigation showed violations of Title IV

which had affected the outcome of the election, Respondent sought a declaration that the Secretary's failure to file suit was "arbitrary and capricious" and an order directing him to file suit to set aside the election (App. 6A).

On November 9, 1973, the Secretary and the Union made an oral motion to dismiss the Complaint (App. 1A). On November 12, 1973, the District Court "determined that this Court lacks jurisdiction over the subject matter of this Complaint" and granted the motion to dismiss (Pet. for Cert. p. 21A). The Court concluded that it lacked "authority" to find that the Secretary's actions were arbitrary and capricious and to order him to file suit. See Doc. 9 at p. 27 (W.D.Pa., Civil No. 73-0954).

The Court of Appeals unanimously reversed, finding federal jurisdiction and concluding that the Secretary's determination not to bring suit is subject to judicial inquiry whether his action was arbitrary and capricious or an abuse of discretion. The Court below found no merit in the argument that the Secretary's "exclusive" post-election power to bring judicial challenge against election violations indicated a Congressional intent to make his inaction unreviewable; quoting this Court's analysis in *Trbovich* of the purposes behind that exclusivity, the Court of Appeals stated that "we do not believe that a limited judicial review of the Secretary's decision not to bring suit would in any way conflict with the purposes behind the Secretary's screening function" (Pet. for Cert. p. 9A). Nor did the Court of Appeals find any merit in the Secretary's contention that the 60-day time limit on the Secretary's suit indicated a Congressional intent to restrict judicial review; pointing to the repeated ex-

ceptions to the rule carved out by the Secretary, the Court below concluded that "a court would be acting consistently with the fundamental purpose of the L-MRDA in entertaining a suit beyond the time limit in those rare cases where the Secretary's original decision not to file suit has been successfully challenged" (Pet. for Cert. p. 11A). Finally, since "the Secretary acts not only for the benefit of the country as a whole, but also on behalf of those individuals whose rights have been infringed," the Court of Appeals rejected the Secretary's "prosecutorial-discretion" argument, and concluded that "To grant the Secretary absolute discretion in this situation seems particularly inappropriate, for if he wrongfully refuses to file suit, individual union members are left without a remedy" (Pet. for Cert. pp. 14A-15A).[3]

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[3] On remand and while the Secretary's petition for certiorari was pending, the Secretary of Labor filed with the District Court a self-serving statement of the reasons for his refusal to bring suit, a statement not even verified by his investigators or anyone else. The Government has printed this statement in its Brief (pp. 1a-16a) without informing the Court that the Department of Labor had refused Respondent's request to take the deposition of various Labor Department officials so the record could be adversary and complete. See, *infra*, pp. 2a, 3a. Any such deposition will show at least (i) that the Secretary's own investigation substantiated many of the charges in Respondent's STATEMENT IN SUPPORT OF CONTEST not covered in the Secretary's statement, (ii) that the Secretary in his statement withdrew votes from the incumbent without crediting them to Respondent in numbers far in excess of the remaining 23-vote margin on which the Secretary relies (Pet. Br. 14a), and (iii) that the Secretary in his statement repeatedly found local unions without adequate election safeguards but inexplicably limited the affected votes to the margin between the candidates. Apart from its erroneous and untested character, the Secretary's statement of reasons also has no conceivable purpose other than as an effort to obscure the statement of facts in the verified complaint which must, as a matter of law, be taken as correct inasmuch as the District Court held that it lacked jurisdiction.

SUMMARY OF ARGUMENT

The Secretary, in contending for absolute, unreviewable discretion not to bring suit to upset an election for any reason that may appeal to him,[4] is fighting an uphill battle. For, as this Court has repeatedly made clear (see, *infra*, p. 9), judicial review of arbitrary administrative conduct is the rule and exceptions are very narrowly restricted to instances of clear and convincing evidence that Congress intended the exception. Here the language, history and purpose of Title IV of LMRDA all reinforce rather than rebut the applicability of the general rule of judicial review.

Thus, the statute is drawn in mandatory terms; it places a positive duty on the Secretary to act. Further, Congress made clear in Title IV its intent to preserve private rights and remedies existing at the time LMRDA was adopted; it can hardly be presumed to have sacrificed those rights to the unreviewable whim of the Secretary. And possibly even more fundamental than the mandatory language and the protection of pre-LMRDA rights and remedies is the inconsistency between the claimed absolute discretion of the Secretary and the basic purpose of Title IV to promote union democracy. Thus, the general rule of judicial review is particularly applicable here, where the statute is in mandatory terms, where Congress recognized and sought to protect pre-existing private rights, and where the basic purpose of the statute comports with the principle of reviewability.

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[4] Counsel for the Secretary in the Court below, when asked whether the Government's claim of immunity from review included a case where a union made a substantial political contribution in return for the Secretary's decision not to sue, answered in the affirmative.

The arguments proffered by the Secretary for avoiding the general rule of judicial review, especially when considered in the light of the narrowness of the exception and the clear indications just recited of Congressional intent *favoring* review, are weak indeed. The "exclusive remedy" provision no more indicates an exception to the usual concepts of judicial review than it indicated an exception to the usual concept of intervention applied by this Court in *Trbovich* v. *United Mine Workers*, 404 U.S. 528 (1972). The Secretary's argument based on his "screening role" under Title IV merely restates the exclusivity argument and wholly fails to demonstrate that Congress intended to make the results of that screening unreviewable. As concerns the possibility of judicial review affecting settlements between the Secretary and the offending union, that question is simply not presented in this case; furthermore, there is no conceivable public interest in the Secretary being able to offer such settlements with the blessing of finality nor for an offending union to be entitled to expect a settlement on this basis. The "60-day provision" for suit by the Secretary has not barred the Secretary from later action in appropriate cases; surely, the Congressional desire that the Secretary initiate action promptly, supports rather than undermines judicial power to assure that he initiates action when he has arbitrarily failed to do so. Finally, the Secretary's strained analogy to prosecutorial discretion falls for this simple reason: a person aggrieved by exercise of prosecutorial discretion not to prosecute in the public interest retains a civil remedy of his own to correct whatever private harm he has suffered. Singly or in combination, none of these five contentions even comes close to building a case for an exception to the general rule of judicial review of

administrative action. It is small wonder, therefore, that this has been recognized by the predominant weight of authority and the unanimous decision below.

ARGUMENT

I

Judicial Review Is the Rule and Administrative Discretion Absolutely Immune From Review Is a Narrow Exception To Be Demonstrated by Clear Congressional Intent.

As the Secretary concedes—by way of grudging understatement—"ordinarily, final administrative decisions are judicially reviewable and may be set aside if arbitrary or capricious" (Pet. Br. p. 9). This is "ordinarily" the case because Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 702, provides that a "person . . . affected or aggrieved by agency action . . . is entitled to judicial review thereof", and Section 10(e) of the APA, 5 U.S.C. 706 (which the Secretary does not even cite), directs in mandatory terms that where "agency action" is found to be "arbitrary, capricious [or] an abuse of discretion . . .", the reviewing court shall set it aside. 5 U.S.C. 706.[5]

After paying mere lip-service to the general reviewability of final administrative action, the Secretary leaps to the APA exceptions where "statutes preclude judicial review," 5 U.S.C. 701(a)(1), and where

[5] Actually, APA restates the rule which had been developed by this Court in the absence of statute. See *United States* v. *Pierce Auto Lines*, 327 U.S. 515, 536 (1946); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612 (1946); Schwartz and Wade, *Legal Control of Government, Administrative Law in Britain and the United States*, Clarendon Press Oxford (1972) ("It has always been basic in American public law that officers vested with discretion possess only the authority to exercise such discretion reasonably. If the discretion is abused, the courts will intervene." p. 262).

"agency action is committed to agency discretion by law," 5 U.S.C. 701(a)(2); he contends that since suit brought by him is the "exclusive remedy" by which a union election may now be challenged, his decision whether or not to bring such a suit is committed to his unreviewable discretion (Pet. Br. p. 9). But in claiming immunity from judicial review, the Secretary struggles in the face of the long line of decisions which stress and restress that even in discretionary areas judicial review is the rule, that exceptions must be demonstrated by evidence of clear Congressional intent, and that the burden of a party claiming an exception is heavy. *Leedom* v. *Kyne*, 358 U.S. 184 (1958); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-141 (1967); *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971) ("This is a very narrow exception. . . . [I]t is applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" 401 U.S. at 410); *Barlow* v. *Collins*, 397 U.S. 159 (1970) (Judicial review is to be held restricted "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent." 397 U.S. at 167). See also L. Jaffe, *Judicial Control of Administrative Action* 346 (1965); 4 K. Davis, Administrative Law Treatise § 28.07 (1958). As the Court stated in *Barlow*:

> ". . . [j]udicial review of . . . administrative action is the rule, and nonreviewability an exception which must be demonstrated." 397 U.S. at 166.

Here, as we next show, all considerations demonstrate that it is the rule which applies, not the exception.

II

The Language, History and Purpose of Title IV of LMRDA Reinforce Rather Than Rebut the Applicability Here of the General Rule of Judicial Review.

Title IV of LMRDA is drawn in mandatory terms; it places a positive duty on the Secretary to act. Section 402(b) provides that the Secretary "*shall* investigate" election complaints and, upon finding of probable cause, he "*shall* . . . bring a civil action. . . ." (Emphasis added).[6] It is precisely this mandatory duty to act to which the Secretary has been faithless, refusing to bring suit even though his own investigation showed that Title IV violations had affected the outcome of the election.

Not only is Section 402(b) couched in mandatory terms, but the mandatory nature of the Secretary's duty where an election was tainted is further evidenced by the clearly expressed Congressional intention to preserve private rights and remedies existing at the time LMRDA was adopted. Thus, Section 403, 29 U.S.C. 483, provides that "Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this subchapter. The remedy provided by this subchapter for challenging an election already conducted shall be exclusive." It imputes irrationality to Congress to suggest that it preserved pre-LMRDA rights of private suit up to the point of an election, but that after the election it desired, without saying so, to sacrifice them to the unreviewable whim of the Secretary.

[6] The word "shall" in Title IV draws added strength from Congress' use of the word "may" in the civil enforcement section of Title II. See Section 210, 29 U.S.C. 440.

As the Government concedes (Pet. Br. p. 12), prior to enactment of LMRDA a defeated candidate for union office had recourse to state courts for election violations of the union constitution or by-laws. Yet the Government is now arguing that Congress intended to give the Secretary absolute discretion to decline to file suit even where a violation of the union constitution or by-laws clearly affected the outcome of the election. The Secretary's construction would not only have LMRDA cut off the post-election remedy for the member which he had in the courts before its enactment; it would impute to Congress the intent to bar judicial recourse to the member even where the Secretary arbitrarily refuses to vindicate his rights under the union's constitution infringed in the union election. It is hard to believe that in one sentence of Section 403—"with respect to elections prior to the conduct thereof"—Congress expressly protected pre-existing private rights of action, yet intended by the very next sentence *without saying so* that after the election there be no judicial recourse at all when the Secretary arbitrarily refuses to initiate the action which the statute says he "shall" bring in given circumstances.[7]

There being no legislative intimation of so severe a result, application of the general rule permitting review where discretion has been abused better comports with the Congressional intent where, as here, Congress has entrusted the Secretary not only with the vindication of the public rights created by the statute but also the pre-existing private rights of members

[7] In addition to the language in Section 403 quoted in the text, Senator Kennedy, the bill's floor manager, made clear in a colloquy with Senator Wiley that the new law was intended to protect existing rights. 104 Cong. Rec. 10947 (1958).

under union constitutions. Where private rights were at stake in suits instituted by federal labor relations agencies, this Court inferred that Congress did not desire to close the judicial door to those private parties. Precisely because their rights were affected, this Court ruled in *International Union, UAW* v. *Scofield,* 382 U.S. 205 (1965), that the private parties in interest could intervene in the public proceedings; it ruled to like effect in *Trbovich* where the Secretary argued that his authority to sue pre-empted all judicial rights of individual union candidates or members.

If that was the proper construction where the agencies were vindicating only federally-created statutory rights, it is all the more the correct construction here, where Congress has also made the Secretary the trustee of private rights under union constitutions by delegating to him their vindication. The duties of a trustee are among the most rigorously enforced in our legal tradition. Far from nonreviewability, courts have traditionally exercised the greatest scrutiny to assure that beneficiaries' interests have been fairly and fully preserved by the trustee. There is thus a "distinctive obligation of trust incumbent on the Government" toward those dependent on its care of their interests. *Seminole Nation* v. *United States,* 316 U.S. 286, 296 (1942). See also, *Squire* v. *Capoeman,* 351 U.S. 1, 8 (1956). Accordingly, judicial review of the federal agency's exercise of discretion is available to assure protection of the private interests entrusted to its care. See, e.g., *United States* v. *Arenas,* 158 F. 2d 730, 749, 752 (C.A. 9, 1946) *cert. den.* 331 U.S. 842.[8]

[8] An interesting analogy is found in *Honda* v. *Clark,* 386 U.S. 484 (1967). There this Court tolled limitations against the Government's claim of sovereign immunity and its assertion of a specific statute of limitations. It found that course "much more consistent with the overall congressional purpose," and one "nowhere eschewed by Congress, to preserve petitioners' cause of action" (p. 501). In reaching that result this Court noted that the limitations period was designed for the benefit of claimants, and "not primarily as a shield for the Government" (p. 496). The Government, the Court emphasized, had no real interest in the fund itself, but was "a mere stakeholder, a custodian in the true sense of the word" (p. 498). Thus, to safeguard the interests of claimants for whom the statute —including its limitations period—was adopted, this Court refused to heed the Government's claim of immunity from suit. So, too, in the present case it is for the benefit of union members that Congress enacted Title IV, and the result more consistent with Congressional intent is to afford them judicial review where their interests have been impaired by the Government's arbitrary refusal to act.

In view of these established principles, only the clearest legislative expression could require the conclusion that in Title IV Congress not only entrusted vindication of private rights to the Secretary's authority to commence judicial enforcement, but also desired to preclude normal judicial review where he has arbitrarily failed to do so.

Possibly even more fundamental than the mandatory language and the protection of pre-LMRDA private rights is the inconsistency between the claimed absolute discretion of the Secretary and the basic purpose of Title IV. There can be no question that "Congress saw the principle of union democracy as one of the most important safeguards" against the abuse of union power. *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 531 (1972). To insure such union democracy, Congress established in LMRDA a comprehensive scheme for the regulation of union elections. It would hardly seem credible for Congress, recognizing the importance of union democracy, to permit

nullification of its basic purpose through arbitrary inaction by the Secretary. We deem it unnecessary to burden the Court with a repetition of the able presentation by the attorneys for the Association for Union Democracy in their *amicus* brief, which demonstrates beyond serious challenge that the arbitrary power claimed by the Secretary is inconsistent with the history and purpose of the statute.

It seems clear, therefore, that the general rule of judicial review is particularly applicable in the circumstance of this case where the statute is in mandatory terms, where Congress recognized and sought to protect pre-existing private rights, and where the basic purpose of the statute comports with the principle of reviewability. We turn now to demonstrate the unpersuasiveness of the Government's efforts to construct a Congressional intention to the contrary.[9]

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[9] The Steelworkers (but not the Secretary of Labor) assert that the result espoused by the Court below violates Constitutional principles of separation of powers (pp. 9-12). But surely their argument is strained and unpersuasive. The criminal prosecution precedents which they cite are hardly apposite when the issue is the Secretary's failure to question the validity of a labor union election by the process which Congress has mandated. Indeed, a *more* serious Constitutional issue would arise were this Court to reject judicial authority, because here Congress entrusted the power to invoke judicial process to the Secretary not only for redress of public rights but also redress of the contract right of the member under his union constitution. A serious Constitutional issue would arise from the construction that Congress made the Secretary's action completely unreviewable after having relegated the union members' private rights of legal redress to the Secretary's care. We know of no situation where Congress has gone so far, and respectfully submit that so harsh a conclusion would itself present questions of due process and transgress the limits of Congressional power to preclude vindication of union members' common law and contract rights.

III

None of the Secretary's Contentions Afford any Basis for Avoiding the General Rule of Judicial Review of Arbitrary Administrative Action.

1. *The "Exclusive Remedy" Provision of Section 403, 29 U.S.C. 483, Does not Indicate any Exception to the Usual Concepts of Judicial Review.*

As indication that Congress intended to immunize from judicial review his decision not to bring suit under Title IV of LMRDA, the Secretary points primarily to the provision in Section 403, 29 U.S.C. 483, that suit by the Secretary is the "exclusive remedy" for challenge of a union election.[10] If the contention has a familiar ring, it is because it is the same contention which the Secretary placed before this Court in *Trbovich*. There the Secretary argued that the "exclusive remedy" provision of Section 403 barred a union member from intervening pursuant to Rule 24(a), Federal Rules of Civil Procedure, in Title IV litigation initiated by the Secretary. But this Court recognized in *Trbovich* that the exclusivity provision of Section 403 is addressed to *initiation* of suit and not to *intervention,* and refused the Secretary's plea

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[10] Reiterated as a chorus through the Secretary's brief (pp. 6, 8, 18, 25) are variations on the catch phrase that Respondent "seeks to achieve by indirection what he cannot do directly—to bring a suit at his own behest against a labor organization to set aside an election of officers." This Court surely knows a straw man when it sees one. Respondent obviously does *not* seek to bring suit at his own behest, but merely to assure that the Secretary perform his duty according to Title IV without abuse of discretion or arbitrary and capricious action. Access to judicial review of arbitrary agency action is by no means the equivalent of a direct right to sue to upset a union election, for the plaintiff's burden is far greater where he must demonstrate the arbitrariness of agency conduct.

to hold that exclusivity of suit somehow established an exception to the normal concept of intervention. Now the argument is recast to the effect that the same exclusivity provision somehow indicates an exception to normal concepts of judicial review. But here, as in *Trbovich,* the answer is that Section 403 merely says that the Secretary is the sole party who can *initiate* suit under Title IV.[11] It no more suggests that the Secretary can exercise his power in this respect arbitrarily and capriciously with immunity from review than it bars intervention. Congress was obviously aware of APA when it enacted Title IV, just as it was obviously aware of Rule 24, F.R.C.P. Surely, if Congress intended a scheme which would avoid normal APA judicial review procedures, it would have said so clearly rather than merely providing that the Title IV remedy involving suit by the Secretary was to be exclusive. Indeed, the exclusivity of the Secretary's power to redress both public and private rights, by initiating suit after a union election, argues more logically *for* the inference that Congress desired the safeguard of normal judicial review than it does for an inference that it added unreviewability to exclusivity.

[11] If anything, the claimed immunity from review is even more difficult to swallow than the claimed ban on intervention proffered to this Court by the Government in *Trbovich*. The claim of nonreviewability necessarily involves the arrogant assertion of an administrative right to act arbitrarily and capriciously, wholly without judicial check. This would leave aggrieved Title IV complainants without any remedy whatsoever, even worse off than they would be without the right of intervention in court. This is so because even without intervention—assuming the Secretary was proceeding according to law without abuse of discretion—the Title IV complainant would still have a remedy through the Secretary's prosecution of his complaint.

2. *The Secretary's "Screening Role" Under Title IV Does not Establish Immunity From Review.*

The Secretary devotes a separate Section of his brief —which purports to be a separate argument—to the proposition that judicial review would be contrary to the Title IV "screening mechanism" (Pet. Br. pp. 18-25). But the screening mechanism is simply part and parcel of the exclusivity power. Surely, as the Court said in *Trbovich,* Congress made suit by the Secretary the exclusive post-election remedy for two principal reasons:

> "(1) to protect unions from frivolous litigation and unnecessary judicial interference with their elections, and (2) to centralize in a single proceeding such litigation as might be warranted with respect to a single election." *Trbovich, supra,* 404 U.S. at 532.

Obviously, both justifications for exclusivity involve the administrative screening mechanism; so put the argument against judicial review in terms of the screening mechanism does no more than restate the argument against review in terms of the exclusivity of the Title IV remedy. Concededly, Congress intended that the Secretary would perform a screening mechanism; but the question here is whether it also meant that such a mechanism should go wholly untended and without check even where working so outrageously as to screen out cases of clear merit. Nothing in Title IV, its legislative history, or this Court's decisions indicates such an odd result.[12]

[12] The Secretary stresses the aspect of the Court's holding in *Trbovich* that the intervenor would not be allowed to assert new bases for upsetting the election not found by the Secretary to have been meritorious (Pet. Br. p. 18). From this the Secretary argues that the Court somehow meant to imply that his decision not to

Nor is the limited judicial review contemplated by the Court of Appeals decision inconsistent in practical terms with the purposes of the Title IV screening function. As the Court of Appeals observed, unions would not be exposed to undue judicial interference with their elections since, under the "arbitrary and capricious" standard of review, the Secretary's decision not to bring suit would be overturned only upon clear evidence that he had ignored a meritorious complaint. At any rate, the primary burden of defending the litigation would be on the Secretary of Labor. And in those instances where challenge to the Secretary's decision not to bring suit was successful, the ensuing litigation would still be centralized in a single proceeding.[13] Thus the Secretary's screening role is in no way inconsistent with the general rule of judicial review.

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prosecute such claims was immune from review. But, as pointed out by the Court of Appeals (Pet. for Cert. p. 9A, n. 7), the issue of reviewability was *not* presented in *Trbovich*. The Court's decision that the intervenor could not circumvent the screening mechanism by raising new issues which the Secretary had already rejected presupposes a proper working of the screening mechanism in which no showing had been made or attempted that the Secretary's rejection of the claims was arbitrary, or constituted an abuse of discretion. As recognized by the Steelworkers' brief (p. 4), petitioner in *Trbovich* was critical of the Secretary's failure to include certain elements in his suit; however, petitioner Trbovich focused his efforts on intervention. Unlike Bachowski, Trbovich never sought to challenge the Secretary's decision on grounds of arbitrariness or abuse of discretion.

[13] The Secretary's dread hypothesis (Pet. Br. p. 22) of a multiplicity of suits, possibly in different courts, challenging the Secretary's decision not to sue to upset a particular election is as unpersuasive as it is lacking in even a single factual precedent over the 16 years of LMRDA. But if this ever should happen, such suits could be consolidated and the eventual suit by the Secretary could be part of the same ongoing proceeding, thereby avoiding duplication of judicial effort.

3. The Assertion That Judicial Review Might Preclude Settlements Between the Secretary and the Offending Union Does Not Support Absolute Discretion in the Secretary.

The Secretary points to nothing in Title IV or any decided case which indicates that the settlement process is so salutary that any checks upon it must be avoided.[14] Here, as throughout his brief, the Secretary incredibly places a higher premium on minimizing interference in internal union affairs than on actively seeking to assure democratic union elections and protecting the rights of individual union members, which after all are the principal goals of the legislation. Even if the Secretary may have greater "success in efforts to settle . . . cases" (Pet. Br. p. 23) if he can assure the settlement will have absolute finality, the interests which Title IV sought to protect are necessarily frustrated in any case where the Secretary's action in settling the complaint without suit was so outrageous as demonstrably to be arbitrary and capricious. There is no conceivable public interest in the Secretary being able to offer such settlements with the assurance of finality, nor for an offending union to be entitled to expect a settlement on this basis.

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[14] The Secretary cites *Calhoon* v. *Harvey*, 379 U.S. 134, 140 (1964) and *Wirtz* v. *Local 153, Glass Bottle Blowers Assn.*, 389 U.S. 463 (1968) in support of the proposition that Congress meant to avoid undue intrusions into union affairs; but neither case in any way supports the Secretary's assertion of the sanctity of the process by which he settles some Title IV complaints short of suit. Indeed, the half-hearted LMRDA enforcement over the years (*Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407 (1972); *amicus* brief for the United Mine Workers) leaves little doubt that some check on such settlements would be highly desirable.

In any event, the reviewability of settlements entered into by the Secretary is simply not presented in this case, and its pre-judgment here as a basis for resolution of the question which *is* pending would be quite inappropriate. The Secretary's fears for his powers of settlement recall the identical fears expressed by the Labor Board in *International Union, UAW* v. *Scofield*, 382 U.S. 205 (1965). This Court (at p. 222, n. 19) refused to anticipate the settlement issue as a basis for resolving the intervention question. Here, too, it will suffice for the Court to resolve the question pending, which has nothing to do with settlements but only with an absolute and arbitrary refusal by the Secretary to take any remedial action whatever.

4. *The "60-day Provision" does not Establish Immunity From Review.*

The Secretary's contention that review would violate Title IV because it would involve initiation of some suits after the 60-day period allowed by Section 402 is as hollow as his exclusivity, screening and settlement contentions. Suit after 60 days, it is said, would undercut the legislative policies of minimizing intrusion into union affairs and resolving as quickly as possible any cloud upon the office holder. Again, the Secretary seeks to obscure the principal legislative aim of Title IV which was not to minimize intrusion or remove clouds but to further the cause of union democracy. The Secretary concedes, as he must, that suit may be brought after the 60-day period where he has obtained the union's consent to extension of the 60-day period, *Hodgson* v. *Local 851, IAM*, 454 F. 2d 545 (C.A. 7, 1971); *Hodgson* v. *International Printing Press & Assist. Union*, 440 F. 2d 1113 (C.A. 6, 1971), *cert. denied*, 404 U.S. 828, and where the Union has obstructed the Secretary's investigation, *Wirtz* v. *Local Union 1622*, 285 F. Supp. 455 (N.D. Calif., 1968); *Wirtz* v. *Independent Workers Union*, 65 LRRM 2104 (M.D. Fla., 1967). These decisions indicate that the 60-day limitation will yield in the face of overriding legislative aims. Clearly the need to assure that there will be an effective remedy is such an aim. As recognized by the Court of Appeals, the concern for speedy resolutions evinced by the 60-day limitation "may be subordinated to the goal of providing an effective remedy for election irregularities" (Pet. for Cert. p. 11 A). Put another way, the issue here is not whether the Secretary will act within 60 days, but whether he will act *at all*. Surely, the Congressional desire that the Secretary initiate action promptly, supports rather than undermines judicial power to assure that he initiates action when he has arbitrarily failed to do so.

5. *The Secretary's Decision under Title IV Is Not Immune from Review as an Exercise of Prosecutorial Discretion.*

The Secretary's attempt to analogize his decision not to sue under Title IV to an exercise of prosecutorial discretion not to prosecute falls for this simple reason: a person aggrieved by exercise of prosecutorial discretion not to prosecute in the public interest retains a civil remedy of his own to correct whatever private harm he has suffered. This point was succinctly put by the Court in *Schonfeld* v. *Wirtz*, 258 F.Supp. 705 (S.D. N.Y. 1966); in rejecting the analogy to prosecutorial discretion in a suit on all fours with this one, the Court stated:

> "If this court may not review [the Secretary's] decision, plaintiff is left without a remedy. This fact distinguishes the present case from cases holding that the decision of a prosecutor not to prosecute may not be reviewed." 258 F. Supp. at 708.

This same point is also the answer to the Secretary's heavy reliance on the NLRA analogy. There Congress created wholly new federal statutory rights which it relegated to the enforcement powers of the Labor Board's General Counsel by the issuance of a Board complaint. Here, however, Congress has vested in the Secretary the power to initiate judicial action after an election not only for redress of rights created by the LMRDA, but also private rights under the union constitution which were violated in the election. To find Congressional intent that exclusively statutory rights be redressed through unreviewable prosecuting authority is one thing. It is quite another to infer that Congress intended unreviewability where private rights have also been entrusted to the litigating authority of a federal agency.

Moreover, Congress directed that where the Secretary finds probable cause to believe that a violation occurred which may have affected the election outcome, he *shall* bring suit seeking to set the election aside. 29 U.S.C. 482; *Howard* v. *Hodgson*, 490 F. 2d 1194, 1197 (C.A. 8, 1974). This additionally distinguishes the Title IV scheme from that embodied in the National Labor Relations Act and other statutes to which the Secretary refers.[15]

[15] While there are some similarities between the NLRA enforcement scheme and that embodied in Title IV, LMRDA, there are also marked differences in the procedures followed by the respective enforcement agencies which weigh heavily in favor of reviewability of the Secretary's decision not to bring suit. In contrast to the procedure followed by the Secretary, that of the NLRB is replete with internal procedural safeguards to prevent arbitrary treatment of those who seek the agency's help. When an NLRB regional office decides against issuing a complaint, the charging party is routinely notified of the reasons—which as a practical matter he has the opportunity to rebut—and given the right of administrative appeal, which involves opportunities for presentation of briefs and oral argument. See Testimony of former NLRB General Counsel Stewart Rothman to Senate Labor Subcommittee, Subcommittee on the NLRB, Committee Print, 87th Cong. 1st Sess. (1960), pp. 31-47. Contrast what happens in the Department of Labor where there is no right of appeal and where reasons for the decision not to issue a complaint are routinely not given, as indicated by the treatment received by Respondent in this case. App. 5A; *infra*, p. 1a. The total lack of internal safeguards against arbitrary action by the Secretary weighs heavily on the side of review.

Moreover, the Secretary's reliance upon decisions such as *Vaca* v. *Sipes*, 386 U.S. 171 (1967) is equally misplaced. *Vaca*, for example, involved a breach of the duty of fair representation which the victim can litigate in federal or state court as well as complain of in an unfair labor practice charge. In such an instance, nonreviewability of the General Counsel's decision does not leave the victim without a remedy. It is to a large extent because of the nonreviewability of the NLRB General Counsel's decisions not to pursue unfair labor practice charges that the courts have taken an increasingly broad view of the matters which are subject to the concurrent jurisdiction of the NLRB and the courts. *Smith* v. *Local 25, Sheet Metal Workers Int. Assn.*, 500 F. 2d 741, 745, n. 2 (C.A. 5, 1974). Here, in contrast, since the statute makes suit by the Secretary the *exclusive* remedy and there is no independent avenue of judicial relief, the availability of some judicial recourse is essential to preserve not merely statutory

rights but also private rights under union constitutions. Thus here a statutory construction in favor of limited judicial recourse in no way impairs the continued unrestricted discretion of federal prosecutors charged only with the enforcement of public rights.[16]

6. *The Weight of Authority Recognizes That Review of the Secretary's Decision not to Bring Suit is Consistent with Title IV.*

Contrary to the assertions of the Secretary, the overwhelming weight of authority bearing upon the question presented in this case rests firmly on the side of the Court of Appeals' view that

> "judicial review would further the general policy of Title IV of the L-MRDA by ensuring that the Secretary does not deny a remedy to those whose rights Congress sought to protect." Pet. for Cert. p. 10A.

First, as already indicated (see *supra,* p. 10), the statute is plain in defining the duty which the Secretary owes to a complaining union member as one which is *mandatory;* the statute provides that, where probable cause exists, the Secretary "shall . . . bring a civil action. . . ." 29 U.S.C. 482. As recognized in *DeVito* v. *Shultz,* 300 F. Supp. 381 (D.D.C. 1969)—one of the two decisions preceding the decision of the Court of Appeals in this case which extensively considered the question posed here—the courts are not lacking in pow-

[16] The Secretary's attempted distinction (p. 9, n. 3) of *Adams* v. *Richardson,* 480 F.2d 1159 (C.A.D.C., 1973) as merely a case of judicial review of a total administrative renunciation of enforcement of the statute misstates the case. The *Adams* order, upheld by the Court of Appeals, directed commencement of formal enforcement proceedings in some 201 individual school districts and 10 state systems of higher education.

er "if it should clearly appear that the Secretary has acted in an arbitrary and capricious manner by ignoring the *mandatory duty* . . . under the powers granted by the Congress." 300 F. Supp. at 382. (Emphasis added.)

The argument that immunity from review is evinced by the exclusivity provision was considered by Judge Gesell in *DeVito, supra,* and rejected. Judge Gesell reasoned as follows:

> "Indeed the very exclusivity of the remedy serves to emphasize the necessity of some degree of Court supervision. To rule otherwise would enable the Secretary to frustrate the will of Congress; it would leave the Secretary's conduct immune from scrutiny in matters where he is charged with significant responsibilities that must be carried out if the sweeping congressional directive to infuse basic principles of democratic free election into union organizations is to be implemented." *DeVito, supra,* 300 F. Supp. at 382.

Accordingly, the Court in *DeVito* held the Title IV complainant entitled to demand that the Secretary exercise his authority according to law and not arbitrarily or capriciously, and required the Secretary to furnish a reasoned statement of the basis for his decision so as to give the Court a basis for determining whether the Secretary's decision was consistent with the law.[17]

[17] The Secretary indicates he has no disagreement with the portion of the Court of Appeals' decision requiring him to furnish the complainant with a statement of reasons for not filing an action (Pet. Br. p. 5, n. 2) and thus that his contrary practice over sixteen years and in this case has been unlawful. This concession is somewhat surprising since the sole function of eliciting a statement of reasons is to establish a basis for judicial review, which the Secretary still persists in contending is precluded by Title IV. We

Similarly, *Schonfeld* v. *Wirtz,* 258 F. Supp. 705 (S.D.N.Y. 1966)—the other previous decision extensively considering the question posed here—rejected the Secretary's assertion of immunity from review on his decision not to sue. That Court too viewed the exclusivity provision of Title IV as weighing on the side of review, reasoning that "[i]f this court may not review that decision, plaintiff is left without a remedy." 258 F. Supp. at 708. The *Schonfeld* Court recognized that immunity from review is a narrow exception which must be positively indicated and simply found "nothing in [LMRDA] to indicate that the Secretary has 'absolute discretion' or that decision is 'totally committed' to his judgment. . . ." 258 F. Supp. 708.

The Secretary's characterization of other decisions involving the reviewability question is simply not candid. For example, the Secretary unabashedly claims that in *Howard* v. *Hodgson,* 490 F. 2d 1194 (C.A. 8, 1974), the Eighth Circuit "concluded that . . . [the Secretary] has unreviewable authority to decide which claims are deserving of prosecution" (Pet. Br. p. 25, n. 11), despite the Eighth Circuit's specific disavowal of any such conclusion. The Eighth Circuit stated: "This is *not* to say that the Secretary's discretion under § 482 is absolute." 490 F. 2d at 1197. (Emphasis added). Indeed, the Eighth Circuit held, contrary to the District Court, that federal jurisdiction was properly invoked, and affirmed the dismissal of the complaint only after holding that the Secretary's action was not contrary to law inasmuch as the Secretary's

find it difficult to discern a Congressional intent to require the Secretary to give his reasons for inaction while making unreviewable reasons once given.

investigation had disclosed merely a simple, technical violation which the Secretary had properly concluded had not affected the election outcome.

Also miscited by the Secretary is the Ninth Circuit's decision in *Brennan* v. *Silvergate District Lodge No. 50,* 503 F. 2d 800 (C.A. 9, 1974), a case involving not the question of reviewability under APA but the right of an incumbent union officer to intervene in defense of Title IV litigation. And the Secretary wholly ignores statements of the Seventh Circuit in *Hodgson* v. *Local 851, IAM,* 454 F. 2d 545 (C.A. 7, 1971) expressing specific agreement with the holdings of *DeVito* and *Schonfeld* that the Secretary's decisions "can be challenged if they constitute an abuse of discretion . . ." 454 F. 2d at 552. Thus, contrary to the Secretary, both of the other Courts of Appeals which have addressed the reviewability question—the Seventh and Eighth Circuits—have indicated agreement with the Third Circuit.

Nor is it at all clear that the District Court decisions cited by the Secretary genuinely support his claim of immunity from review. As observed by Judge Gesell in *DeVito,* such decisions as *Katrinic* v. *Wirtz,* 62 LRRM 2557 (D.D.C., 1966), and *Altman* v. *Wirtz,* 56 LRRM 2651 (D.D.C. 1964), involving dismissals of attempts to challenge the Secretary's decision, "do not in any way indicate that the Court did not make sufficient inquiry to be satisfied that the Secretary was properly complying with his responsibilities." 300 F. Supp. at 384, n. 2. Perhaps most unpersuasive is the Secretary's suggestion that *DeVito* somehow involves a "middle ground" (Pet. Br. pp. 25-26, n. 11) since the Secretary was ordered to give a statement of his reasons for refusing to bring suit, but thereafter

the complaint was dismissed. The *DeVito* opinion, as indicated above, makes abundantly clear that the Secretary's decision could be set aside if found by the Court to constitute an abuse of discretion. And *Ravascheri* v. *Shultz*, 75 LRRM 2272 (S.D.N.Y. 1970), also cited by the Secretary for the proposition of nonreviewability, indicates its accord with *Schonfeld* and ultimately held only that the Secretary had properly exercised his discretion in the particular case.

To the extent that courts have been reluctant, as a practical matter, to become involved in reviewing the Secretary's decisions not to bring suit, such reluctance has been criticized in scholarly analyses as being inconsistent with the remedial purposes of Title IV and out of step with expanding notions of APA judicial review generally. *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407 (1972) [18]; Estreicher, *Pre-Election Remedies Under the Landrum-Griffin Act: The "Twilight Zone" Between Election Rights Under Title IV and the Guarantees of Titles I and V*, 74 Colum. L.Rev. 1105, 1117 (1974). And it is significant that while the Secretary invariably contends, whenever his decision not to bring suit is challenged, that immunity from review is to be inferred from the exclusivity provision, no court has ever actually adopted that position. This Court, too, should refrain from engrafting an unreviewability provision onto Title IV, leaving Congress free to

[18] "Judicial reluctance to compel § 402 suits overlooks the fact that the individual complainant can vindicate his Title IV rights only through suit by the Secretary. A determination by the Department not to sue is effectively a final judgment on the merits. Moreover, in other areas, courts are beginning to exercise judicial review when the abstention of an agency has such an effect of finality." 81 Yale L.J. at 501.

achieve that result by clear statutory language should the Department of Labor persuade the legislature in favor of so drastic an exception to the usual principle.

CONCLUSION

Although Congress well knows how to make administrative action unreviewable, in Title IV of LMRDA it employed mandatory terminology and nowhere indicated that the general rule of reviewability was to be abrogated. In such instances, if there is *any* substantial policy reason which favors judicial review, it seems clear that this Court should not presume a Congressional intent to preclude it. And here we have shown that there are not only substantial policy reasons favoring review, but that on balance they are far more weighty than the policies which the Secretary advances. Under such circumstances, Congress not having abrogated the reviewability principle or intimated any desire to do so, it is surely the rule of reviewability which should apply, rather than the narrow exception.

Certainly it is hoped that in the majority of cases the Secretary will perform his duties and that his decisions not to bring suit under Title IV will be well based. But where that is not the case, the courts must step in. In litigation involving the Federal Communications Commission, Chief Justice Burger once referred to the theory that the FCC represents the interests of the public as "one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear . . . that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it." *Office of Commun-*

ication v. *Federal Communications Commission,* 359 F. 2d 994, 1003-4 (C.A.D.C., 1966). The Secretary of Labor is certainly no more infallible than the FCC, or the other federal agencies whose arbitrary actions are now clearly subject to judicial safeguards under federal statutes as implemented by this Court's rulings. Congress has rightly perceived that unreviewability yields to agencies an absolute power which is likely to corrupt. Where Congress has not specified its intent to apply that dangerous exception to the rule of judicial review, there is no basis for abrogation of judicial safeguards.

For the reasons stated herein, the decision of the Court of Appeals should be affirmed.

JOSEPH L. RAUH, JR.
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Attorneys for Respondent

APPENDIX

APPENDIX

U.S. DEPARTMENT OF LABOR
LABOR-MANAGEMENT SERVICES ADMINISTRATION
Office of Labor-Management and Welfare Pension Reports
Washington, D.C. 20216

Nov. 7, 1973

Mr. Walter Bachowski
8 Cross Street
Pittsburgh, Pennsylvania 15205

Dear Mr. Bachowski:

This is to notify you of the disposition of your complaint to the Secretary of Labor alleging that violations of Section 401 of the Labor-Management Reporting and Disclosure Act of 1959, as Amended (LMRDA), had occurred in the election of District Director conducted by District 20, United Steelworkers of America, AFL-CIO, Baden, Pennsylvania, on February 13, 1973.

Pursuant to Sections 402 and 601 of the Act, an investigation was conducted by this Office. Based on the investigative findings, it has been determined, after consultation with the Solicitor of Labor, that civil action to set aside the challenged election is not warranted. We are, therefore, closing our file in this case as of this date.

Sincerely yours,

/s/ JOHN V. MORAN
John V. Moran
Acting Director

KENNETH J. YABLONSKI
ATTORNEY AT LAW
505 WASHINGTON TRUST BUILDING
WASHINGTON, PENNSYLVANIA 15301

December 17, 1974

STEPHEN ERNST, ESQUIRE
Department of Labor
3535 Market Street
Philadelphia, Pennsylvania 19104

RE: Peter J. Brennan, Secretary of Labor
United States Department of Labor v.
United States Steelworkers of America
AFL-CIO-CLC (District 31)
Edward Sadlowski, Intervenor

Dear Mr. Ernst:

We received the reply of Secretary Brennan and after having reviewed it, we feel that it is totally inadequate. It is our desire to take the deposition of various persons from the Labor Department in an effort to properly place before the Court all of the facts involved. We realize, of course, that when the Secretary filed his reply, it was stated that in doing so he was not waiving any rights he might have concerning the Petition for Certiorari which was pending in the Supreme Court at the time. Since certiorari has been granted, I would appreciate your advising me whether or not you will agree to permit us to proceed with the depositions we intend or will you raise the pendency of this action in the Supreme Court as a bar. I think you will agree that it is better to have an understanding at this time rather than for me to proceed with filing notices of depositions and then you, if you intend to, file an objection.

I would appreciate hearing from you regarding this at your earliest convenience.

Very truly yours,

KENNETH J. YABLONSKI

CC: James English, Esquire
Joseph L. Rauh, Esquire

U.S. DEPARTMENT OF LABOR
OFFICE OF THE REGIONAL SOLICITOR
3535 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19104
215-597-1126

December 24, 1974

Kenneth J. Yablonski, Esquire
505 Washington Trust Building
Washington, Pennsylvania 15301

Re: Walter Bachowski v. Peter J. Brennan, et al.
USCA 3rd Cir., No. 73-2029

Dear Mr. Yablonski:

We are in receipt of your letter of December 17, 1974 wherein you indicate your desire to take the depositions of certain personnel of the U.S. Department of Labor.

Please be advised that in light of the pendency of the appeal in this matter before the U.S. Supreme Court, we do not believe that the taking of such depositions would be procedurally correct. As you are aware, the Secretary's filing of a statement of his position with respect to not filing suit in the above matter was done, as was explicitly stated, without waiving any rights with respect to the pendency of the present Supreme Court proceedings.

Therefore, at the present time we will not agree to the taking of the stated depositions.

Very truly yours,

/s/ LOUIS WEINER
Louis Weiner
Regional Solicitor

SOL:SKE:sd

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-466

PETER J. BRENNAN, Secretary of Labor,
Petitioner,

v.

WALTER BACHOWSKI,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF UNITED MINE WORKERS OF AMERICA AS AMICUS CURIAE

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INDEX

	Page
STATEMENT OF INTEREST	1
ARGUMENT	3
I. THE DECISION BY THE SECRETARY OF LABOR NOT TO COMMENCE AN ACTION UNDER TITLE IV OF LMRDA IS REVIEWABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT	3
II. NON-REVIEWABILITY OF THE SECRETARY'S REFUSAL TO LITIGATE CANNOT BE IMPUTED TO CONGRESS BY ITS ENACTMENT OF LMRDA	4
III. JUDICIAL REVIEW OF THE SECRETARY'S DECISION NOT TO SUE IS ESSENTIAL TO EFFECTIVE ENFORCEMENT OF LMRDA	8
CONCLUSION	11

CITATIONS

Cases

Abbott Laboratories, Inc. v. *Gardner,* 387 U.S. 136 (1967)	4
Cascade Natural Gas Corp. v. *El Paso Natural Gas Corp.,* 386 U.S. 129 (1967)	11
Citizens to Preserve Overton Park, Inc. v. *Volpe,* 401 U.S. 402 (1971)	4
Hall v. *Cole,* 412 U.S. 1 (1972)	2
Hodgson v. *International Printing Press & Assist. Union,* 440 F.2d 1113 (C.A. 6, 1971), *cert. denied,* 404 U.S. 878	7
Hodgson v. *Local 851, IAM,* 454 F.2d [illegible] (C.A. 7, 1971)	7
Hodgson v. *Local Union 6799,* 403 U.S. [illegible] (1971)	5

Page

Hodgson and Trbovich v. *UMWA,* 344 F.Supp. 17 (D.D.C., 1972) 2, 9

Hodgson v. *UMWA,* 344 F.Supp. 990 (D.D.C., 1972), *aff'd* 475 F.2d 1293 (C.A.D.C., 1973) 9

Hodgson v. *UMWA,* 473 F.2d 118, (C.A.D.C., 1972) 9, 10

Monborne v. *UMWA,* 342 F.Supp. 718 (W.D. Pa., 1972) 9

Trbovich v. *United Mine Workers,* 404 U.S. 528 (1972) 2, 5, 8

Wirtz v. *Local 153, Glass Bottle Blowers Ass'n,* 389 U.S. 463 (1968) 7

Wirtz v. *UMWA,* C.A. No. 3071-64 (D.D.C.) 9

Yablonski v. *UMWA,* 466 F.2d 424 (C.A.D.C., 1972), *cert. denied,* 412 U.S. 918 2

Statutes

Administrative Procedure Act
5 U.S.C. 551, *et seq.* 4

5 U.S.C. 701(a) 4

5 U.S.C. 702 4

Labor-Management Reporting and Disclosure Act
29 U.S.C. 401, *et seq.* 2

29 U.S.C. 481(h) 4

Miscellaneous

1 Davis *Administrative Law Treatise,* § 104 (1958) 3

Compliance, Enforcement and Reporting under LMRDA 10

L. Jaffe, *Judicial Control of Administrative Action* (1965) 4

Note

Union Elections and the LMRDA: Thirteen Years of Use and Abuse, 81 Yale L.J. 403 (1972) 7, 8

IN THE

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No. 74-466

PETER J. BRENNAN, Secretary of Labor,
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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF UNITED MINE WORKERS OF AMERICA AS AMICUS CURIAE

STATEMENT OF INTEREST

The United Mine Workers of America (hereafter "UMWA") is an International labor organization with more than 200,000 members located in 23 States and 4 Provinces in Canada. The United Mine Workers of America has over the course of the past decade been subject to numerous actions brought against it under almost all of the titles of the Labor-Management Reporting and Disclosure

Act, 29 U.S.C. 401, *et seq.* (hereafter "LMRDA"). These actions were necessary because the UMWA had operated in flagrant violation of the Act from the date of its enactment until late 1972. There is no question that by enhancing democracy within the UMWA these actions were beneficial both to the Union and its members; indeed, the courts have so held, *Yablonski* v. *UMWA,* 466 F.2d 424 (C.A.D.C., 1972), *cert. denied,* 412 U.S. 918; *Hall* v. *Cole,* 412 U.S. 1, 12 (1972).

Following this Court's decision in *Trbovich* v. *United Mine Workers,* 404 U.S. 528 (1972), a rank and file member of the UMWA was permitted to intervene in the Secretary's lawsuit to overturn the UMWA's 1969 election of International Officers. Thereafter, the intervenor participated in the trial of that action and in the formulation of the broad equitable decree which was entered by the District Court.[1] As a result of that decree, a rerun election was held in December 1972, and a new, reform administration was elected to the UMWA's highest offices.

Since then the UMWA has sought to become a model of union democracy. Trusteeships which had been maintained by the International Union over its District intermediate bodies have been eliminated and officers of the organization at all levels are now elected consistent with Titles III and IV of LMRDA by popular referendum vote. At the union's International Convention in December 1973, the UMWA Constitution was completely redrafted eliminating provisions which were inconsistent with LMRDA, incorporating the guarantees of the Act, and, in fact, adding democratic rights and safeguards beyond those guaranteed by the Act. Most recently, the UMWA utilized procedures established in its 1973 Constitution and submitted its new national collective bargaining agreement to the UMWA membership for a nationwide ratification vote.

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[1] *Hodgson and Trbovich* v. *UMWA,* 344 F.Supp. 17, 35 (D.D.C., 1972).

The struggle by UMWA members to overturn tyranny in their Union was a lonely and difficult one in part because of apathy and indifference, if not outright prejudice against them, by the officials within the United States Department of Labor, purportedly the guardians of union members' rights under LMRDA. Too often, union reformers have found the Department of Labor allied with union incumbents against their interests.

Because it is the belief of the UMWA that the Secretary of Labor has not, since the effective date of LMRDA in 1959, forcefully carried out the salutary legislative objective of assuring that trade unions will be free and democratic, the UMWA urges this Court to affirm the decision of the United States Court of Appeals for the Third Circuit. By holding that the Secretary's decision not to bring suit under Title IV is subject to judicial review, the Court will help assure that the Secretary becomes, as Congress intended, an effective and responsible advocate for free and democratic union elections.

In urging affirmance of the Third Circuit decision, the UMWA obviously takes no position regarding the validity of the particular election under challenge, nor does it otherwise seek to meddle in the internal affairs of another union. The UMWA's sole interest is to express its views on a narrow legal issue which has tremendous practical significance for the protection of union members' rights and the enhancement of union democracy.

ARGUMENT

I. THE DECISION BY THE SECRETARY OF LABOR NOT TO COMMENCE AN ACTION UNDER TITLE IV OF LMRDA IS REVIEWABLE UNDER THE ADMINISTRATIVE PROCEDURE ACT.

Following the establishment and proliferation of administrative agencies and bureaus under the New Deal,[2] Con-

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[2] See generally, 1 Davis *Administrative Law Treatise,* §104 at 27-30 (1958).

gress in 1946 enacted the Administrative Procedure Act (hereafter "APA"), 5 U.S.C. § 551, *et seq.* In plain terms, 5 U.S.C. § 702 provides that: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." Though Congress provided exceptions to an aggrieved party's right to judicial review of agency action in 5 U.S.C. § 701(a), judicial review of agency action is clearly the rule, not the exception.

The decisions of this Court uniformly establish the principle that agency action is subject to judicial review absent "clear and convincing evidence" that Congress intended to exempt such action from judicial scrutiny, *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 410 (1971); *Abbott Laboratories, Inc.* v. *Gardner,* 387 U.S. 136, 140-41 (1967). Perhaps understandably, the Secretary's brief fails to address these decisions. Congress had APA in mind when enacting LMRDA, and Title IV in particular;[3] significantly it carved out no express exception to the rule of judicial review of the Secretary's decision not to file suit under Title IV. Absent such a specific exclusion by Congress of APA review, a decision by the Secretary not to litigate is plainly reviewable by the courts.[4]

II. NON-REVIEWABILITY OF THE SECRETARY'S REFUSAL TO LITIGATE CANNOT BE IMPUTED TO CONGRESS BY ITS ENACTMENT OF LMRDA.

The cases set forth above establish a presumption of reviewability with which the Secretary never comes to grips. The entire text of the Secretary's brief is devoted to an analysis of the statutory scheme of Title IV of LMRDA as

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[3] See 29 U.S.C. §481(h) which requires the Secretary to hold a hearing in compliance with the APA to determine whether a union's constitution makes adequate provision for removal of officers.

[4] See generally, L. Jaffe, *Judicial Control of Administrative Action,* 346 (1965).

the basis for what at best would be an inference that Congress intended non-reviewability. Not once does the Secretary so much as acknowledge that private rights are at stake in Title IV proceedings, a fact which this Court clearly recognized in *Trbovich, supra* at 538-539. Indeed, virtually the identical arguments advanced by the Secretary in opposition to review of his determination not to sue were made by him in opposition to the granting of intervention and were squarely rejected by this Court in *Trbovich, supra.*

The cornerstone of the argument for non-reviewability is that a Title IV suit by the Secretary is the exclusive post-election remedy for union members dissatisfied with the results of a union election. But exclusivity of remedy militates in favor—not against—review of the Secretary's decision not to litigate. As the Secretary acknowledges, LMRDA preempted a union member's common law state court remedies to void a union election (Brief of Secretary, p. 12). Because LMRDA requires that all post-election complaints be channeled through the Secretary, it is all the more imperative that the Secretary's decision not to litigate be subject to judicial check. Even though the Secretary minimizes the impact of shabby Title IV enforcement on union members ("[t]he stake of complainants in [NLRB] cases is thus more immediate than that of a complaining member in a Title IV case . . ." (Brief for the Secretary, p. 30)), the tragic fact is that union members often stake their life savings and sometimes even their lives by seeking union office.

The Secretary's second argument is that review of the Secretary's decision not to sue would interfere with his function of screening election complaints and subject unions to frivolous litigation. There is no assertion here that Respondent sought to raise in his district court pleadings issues not previously presented within his union or before the Secretary, compare *Hodgson* v. *Local Union 6799,* 403 U.S. 333 (1971). The Respondent simply seeks to compel the

Secretary to justify his inaction on the issues Respondent has placed before him. Though it is true that a union can and perhaps should be a party defendant to such a suit, the principal responsibility for defending such an action falls on the Secretary, not the union. Any burden on the union is slight compared with that faced by the aggrieved union member in retaining counsel to challenge the Secretary's decision, to say nothing of the very substantial burden of proof upon the union member in such a proceeding.

The third argument advanced by the Secretary is that if he is required to account for his inaction, he may be subjected to multiple litigation over a single election. This is sheer sophistry. The union member who seeks judicial review must also have been the initiator of the Secretary's investigation. Therefore, it is unlikely that there could be more than one complainant regarding a single election. If there were, venue of such suits would most likely be in the same district and the cases could be consolidated in a single proceeding. Even if suits were properly brought in more than one judicial district, they could be brought before the multi-district panel and consolidated before a single judge.

Finally, the Secretary argues that if his decision is subject to review, the stautory timetable will be upset and those officers whose election has been challenged will hold office under a cloud. It is somewhat strange that the Secretary should place so much reliance upon a principle which he regularly violates. "Time" has not been "of the essence" to the Secretary and should not be recognized as any justification for non-review. In this very case—despite the statutory command that suit be filed within sixty days after the complaint is received—the Secretary and the union agreed upon an extension of sixty days of the time allowed for initiating suit. While the Secretary's practice of seeking extensions from potential union defendants has been sustained by the courts, *Hodgson* v. *Local 851, IAM,* 454 F.2d

545 (C.A. 7, 1971); *Hodgson* v. *International Printing Press & Assist. Union,* 440 F.2d 1113 (C.A. 6, 1971), *cert. denied,* 404 U.S. 878, it has been soundly criticized as disserving the interests of union members which LMRDA directs the Secretary to protect, *Local 851, IAM, supra,* 554, et seq. (Stevens, dissenting).

Not only has the Secretary been chronically guilty of delays in initiating suits, also, he has failed to prosecute them expeditiously once initiated. One of the first major issues in the enforcement of LMRDA which this Court found necessary to resolve involved the question whether the occurrence of the next regularly-scheduled union election—prior to resolution of Title IV litigation challenging the *last* election—rendered the Secretary's suit moot, *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n,* 389 U.S. 463 (1968). The Secretary talks about his concern for "resolving as quickly as possible any cloud upon office holders" (Brief of Secretary, p. 23), but his conduct speaks louder than his words. In *Trbovich, supra,* the Secretary acquiesced in the failure of the Defendant even to file a responsive pleading for more than eight months after suit was commenced. Though the case moved expeditiously after intervention was granted, judgment was not entered until two years and three months after suit was filed, and a re-run was not held until three years after the challenged election. During this entire period, the union officers who had perpetrated the fraud which led to the voiding of the election had title to their offices. Nor is the UMWA case atypical. Data for a three-year period contained in a study of the administration of LMRDA under a grant by the American Bar Foundation revealed that the average time lapse between the filing of a Title IV complaint and settlement or judgment ranged between two years and two years and six months. Note, *Union Elections and the LMRDA: Thirteen Years of Use and Abuse,* 81 Yale L.J. 403, 573 (1972).

In summary, the Secretary's arguments that the stautory

scheme of Title IV should operate to preclude the protection of individual rights are without merit and should be rejected for the same reasons this Court rejected them in *Trbovich.*

III. JUDICIAL REVIEW OF THE SECRETARY'S DECISION NOT TO SUE IS ESSENTIAL TO EFFECTIVE ENFORCEMENT OF LMRDA.

Contrary to the Secretary's contention, judicial review of his refusal to file a Title IV complaint is an essential means of assuring that the Secretary will fulfill the role envisioned for him by Congress as "the union member's lawyer," *Trbovich, supra,* at 539. If the record of LMRDA enforcement by the Department of Labor were exemplary, the need for judicial oversight would be less compelling, but sadly that has not been the case.

The sorry record of enforcement of LMRDA is chronicled in more than 160 pages of the Yale Law Journal. The Yale study observed:

> The Department has adopted an administrative stance which emphasizes negotiated compliance with LMRDA requirements. The Department's procedures place far greater reliance on the internal union appeals process than on litigation and emphasize promotion of the DOL's conception of the public interest rather than enforcement of individual rights. Note, *Union Elections and the LMRDA, supra,* at 474.

Senator Robert P. Griffin, co-sponsor of LMRDA, has characterized the Department's performance as follows:

> "[O]ver the past 12 years under four administrations the Labor Department has generally been timid and reluctant to give Landrum-Griffin [the popular name for LMRDA] the vigorous implementation and strict enforcement that Congress expected." United Mine Workers' Election, 1971, Hearings before the Subcommittee on Labor of the Senate Subcommittee of Labor and Public Welfare, 92d Congress, 1st Sess. (Part 2), p. 42 (1971).

Internal democracy in the context of a multi-tiered labor organization such as the UMWA depends upon compliance not only with Title IV, but with Title III, by which Congress strictly limited the conditions under which unions could impose trusteeships and thereby suspend free elections and other aspects of self-government of their subordinate bodies. While the Secretary was given a key role in the enforcement of Title III, his performance under that Title has been a public scandal.[5] Nearly all of the UMWA District organizations had been maintained in trusteeship for decades prior to the enactment of Title III and the perpetuation of those trusteeships was allowed for years thereafter. Five years after enactment of LMRDA—in December 1964—the Department finally brought suit challenging some—but not all—of the trusteeships. *Wirtz* v. *UMWA,* C.A. No. 3071-64 (D.D.C.). The suit languished on the district docket for nearly seven years, becoming one of the oldest on record before it was even brought to trial in the summer of 1971. A case involving exactly the same legal issues was privately filed by a UMWA member in mid-1971 and summary judgment entered for the plaintiff in only ten months,[6] still in advance of the decision in the Secretary's 1964 action.[7] Even though union members ultimately inter-

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[5] The point is critical here because of the intimate relation of the two Titles. In the case of the 1969 UMWA election, perpetuation of the trusteeships over the Districts was recognized as an important factor in the perversion of electoral processes at the International Union level, *Hodgson* v. *UMWA, supra,* 344 F.Supp. at 21, 30; *Hodgson* v. *UMWA,* 473 F.2d 118, 123, n.21 (C.A.D.C., 1972).

[6] *Monborne* v. *UMWA,* 342 F.Supp. 718 (W.D. Pa., 1972).

[7] *Hodgson* v. *UMWA,* 344 F.Supp. 990 (D.D.C., 1972), *aff'd* 475 F.2d 1293 (C.A.D.C., 1973).

vened in the Secretary's case over his objection[8] and prodded him to act and the UMWA's new leadership cooperated fully in quick implementation of the decree, remedial elections were not concluded until mid-1973, eight and one-half years after suit was filed.

The Secretary's own statistics demonstrate that the UMWA example is not unusual. During the first seven years following the enactment of LMRDA, 1,500 trusteeships were reported to the Secretary. In the last six years, the Secretary's annual report of Compliance, Enforcement and Reporting under LMRDA has shown the existence of between 307 and 381 trusteeships.[9] Despite the prevalence of trusteeships and the clear Congressional mandate that trusteeships be severely restricted, the Secretary has, during the fifteen years since the passage of LMRDA, filed only four Title III cases.[10]

Failure of the Secretary to pursue meritorious complaints —whether under Title III or Title IV of the Act—can only undermine any prospect that the legislative goals of LMRDA will be attained. Judicial review of the Secretary's decision not to sue under Title IV, like intervention in appropriate cases, is essential to assuring the vindication of vital private rights.

Intervention by union members in Title IV cases once

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[8] *Hodgson* v. *UMWA*, 473 F.2d 118 (C.A.D.C., 1972). In summarily reversing the denial of intervention by the District Court, the Court of Appeals noted that the case "had consumed more than seven years while three Secretaries of Labor . . . successively manned the helm" and that it "suffers by comparison with other litigation brought by union members to liquidate trusteeships which were concluded successfully in far less time." 473 F.2d at 118.

[9] *Compliance Enforcement and Reporting under LMRDA for 1967, 1968, 1969, 1970, 1971, 1972, and 1973.*

[10] *Compliance, Enforcement and Reporting under LMRDA for 1973*, p. 9.

they have been initiated insures that the Secretary will not "knuckle under"[11] to one-sided pressure from the defendant union. Without judicial review of the Secretary's decision not to sue, there cannot be any assurance that he has not "knuckled under" to similar one-sided pressure during the investigative or deliberative phase of the proceeding. The right of judicial review of the Secretary's decision not to sue is but a logical extension of the member's right to intervene once suit has been filed. Affirmance of the Third Circuit's decision is essential to insure a fair and proper administration of LMRDA.

CONCLUSION

For all the foregoing reasons, amicus curiae respectfully prays this Court to affirm the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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[11] *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Corp.*, 386 U.S. 129, 142 (1967).

MAR 1 1 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-466

PETER J. BRENNAN, SECRETARY OF LABOR,
Petitioner

v.

WALTER BACHOWSKI

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF AMICUS CURIAE FOR THE ASSOCIATION FOR UNION DEMOCRACY, INC.

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INDEX

	Page
STATEMENT OF INTEREST	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. The Secretary of Labor's refusal to bring suit to set aside a challenged union election is not immune from judicial review to determine whether that refusal was arbitrary or was not in accordance with the law	7
II. Judicial Scrutiny of the Secretary's refusal to sue is necessary for Title IV to fulfill its purpose	17
CONCLUSION	24

TABLE OF CITATIONS

CASES:

Abbott Laboratories v. *Gardner*, 387 U.S. 136	7
Amal. Ass'n Street, Elect. Ry. & Motor Coach Employees v. *Lockridge*, 403 U.S. 274	15
American Federation of Musicians v. *Wittstein*, 379 U.S. 171	17
Citizens to Preserve Overton Park v. *Volpe*, 401 U.S. 402	7
Ferry v. *Udall*, 336 F.2d 706, certiorari denied 381 U.S. 904	14-15
NLRB v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418	19
Trbovich v. *United Mine Workers of America*, 404 U.S. 528	9, 11, 13, 14
Vaca v. *Sipes*, 386 U.S. 171	15
Wirtz v. *Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463	8-9, 17-18

STATUTES:

Labor-Management Reporting And Disclosure Act of 1959, 73 Stat. 519, 29 U.S.C. 401 *et seq.*:	
Section 210, 29 U.S.C. 440	15
Section 401, 29 U.S.C. 481	8

Page

Section 402(b), 29 U.S.C. 482(b) 5, 14, 15, 16
Section 402(c), 29 U.S.C. 482(c) 16
Section 403, 29 U.S.C. 483 9

Labor-Management Relations Act, 61 Stat. 136, as amended 73 Stat. 541, 28 U.S.C. 151 *et seq.*:
Section 10(b) 15

CONGRESSIONAL MATERIALS:

104 Cong. Rec. 10947 ..... 10, 11-12, 16

105 Cong. Rec. 19765 16

Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on Labor-Management Reform Legislation, S.505 etc., 86th Cong., 1st Sess. 12, 14

H.R. 8342, 86th Cong., 1st Sess. 12

H. Rep. No. 741, 86th Cong., 1st Sess. 12, 17

H. R. No. 1187, 86th Cong., 1st Sess. (1959) (Conference Report) 16

S. 3974, 85th Cong., 2d Sess. 11, 12

S. 505, 86th Cong., 1st Sess. 12

S. Rep. No. 1684, 85th Cong., 2d Sess. (1958) 11-16

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Page

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Summers, Judicial Regulation of Union Elections, 70 Yale L.J. 1221 (1961) 18

U.S. Dept. of Labor, Union Elections Under The LMRDA, 1966-70 (1972) 19, 20

Union Elections And The LMRDA: Thirteen Years of Use And Abuse, 81 Yale L.J. 407 (1972) 19, 20, 21, 22

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BRIEF AMICUS CURIAE FOR THE ASSOCIATION FOR UNION DEMOCRACY, INC.

STATEMENT OF INTEREST

The Association for Union Democracy, Inc. is a non-profit corporation registered in the State of New York in 1969. [Granted tax-exempt status by the Internal Revenue Service in January 1971; and subsequently classified by the IRS as a non-private foundation.] The aim of the Association, as stated in its certificate of incorporation, is to further democratic principles and practices in American labor organizations both by encouraging union members to participate actively in the internal life of their union and by protecting the exercise of their democratic rights within

their union. In establishing the Association, its founders were motivated by the realization that no other citizens organization devoted itself primarily to this objective.

The Association does not take sides in internal union disputes over policy, program, or candidates. But it does propose that the rivalries and antagonisms which arise in the labor movement, as in other social institutions, be resolved on the basis of democratic procedures and due process.

The sponsors of the Association include persons who are or have been known leaders of major unions, religious leaders concerned with social justice, members of union public review boards, lawyers, prominent educators in workers education in labor law. Despite divergent backgrounds, all share the view that the labor movement is one of the great forces which help sustain democracy in our national life, and that if it is to serve this purpose most effectively, union leaders must be responsive to their members and unions must be democratic in their internal life.

One of the primary concerns of the Association has been in promoting and protecting the democratic process in union elections as the most crucial single element of union democracy. The Association has recognized that in some unions fair and honest elections can be secured only through the intervention of the law to protect democratic rights. The vitality of union democracy in such unions depends on the availability of effective legal protection.

Under the LMRDA the Secretary of Labor is assigned a heavy responsibility for protecting fair union election procedures. Once an election has been held,

he is the sole recourse of union members whose rights to a fair election have been denied. The present case raises the critical issue how the Secretary will fulfill that responsibility and whether he can be required to provide union members the protection the statute guarantees. How this case is decided will vitally affect the work of the Association and the values it seeks to promote.

The Association presents this brief in support of Mr. Bachowski with the consent of counsel for all parties.

STATEMENT OF THE CASE

Respondent Walter Bachowski was a candidate for the office of District Director of District 20 of the United Steelworkers of America in an election held on February 13, 1973. He was defeated in that election by 907 votes out of approximately 24,000 votes cast. After exhausting his remedies within the union, he filed a timely complaint with the Secretary of Labor on June 21, 1973, alleging numerous violations of the union constitution and Section 401 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).

Following an investigation of this complaint, the Secretary on November 5, 1973, notified Bachowski by telephone that he had decided not to file suit to set aside the election. No explanation was given why the suit would not be filed.

Respondent thereupon brought suit against the Secretary and the union, seeking to compel the Secretary to file suit to set aside the election. The complaint alleged, *inter alia*, that the Secretary's investigation

had substantiated the alleged charges of election irregularities and that those irregularities had affected the outcome of the election, but notwithstanding this the Secretary had refused to set aside the election and had failed even to inform Bachowski of his reasons for that refusal.[1]

The district court dismissed the complaint for lack of jurisdiction over the subject matter. The court of appeals reversed, holding that the district court had federal court jurisdiction and that the Secretary's decision not to bring suit to upset a union election under Section 402 of LMRDA was subject to judicial review. *Bachowski* v. *Brennan,* 502 F.2d 79.

SUMMARY OF ARGUMENT

The Secretary contends that he has absolute discretion to refuse to bring suit to set aside a union election even though his own investigation has shown that violations of Title IV of the LMRDA have affected the outcome of that election. That contention is contrary to the intention of Congress, derogates from the rights guaranteed by Title IV, and undermines the purposes of the Act.

The Secretary was charged by Congress with the responsibility of enforcing the rights guaranteed by Title IV to assure fair and democratic rights. Those rights are basic democratic rights in which the public has an interest, but they are also fundamental individual rights of union members. After an election

[1] The statement of reasons attached as an appendix to Petitioner's brief was submitted to the district court more than a year later and in compliance with an order of the court of appeals in the case now being appealed.

those rights can be enforced only through the Secretary. His insistence on absolute discretion to refuse to sue is assertion of an unreviewable power to deprive members of their basic democratic rights. This is clearly not the role contemplated by Congress when it made his suit the exclusive remedy for challenging an election.

The Secretary was intended by Congress to serve three functions. First, he was to serve as the union member's lawyer to protect the members' rights which they might be unable to protect themselves. Second, he was to serve as a screen to protect unions from frivolous suits where there was no probable cause to believe that violations had occurred or the violations were technical and could not have affected the outcome of the election. He was not to protect unions from meritorious suits where there were grounds for setting aside the election. Third, the Secretary's suit was to consolidate in a single suit all meritorious complaints challenging the validity of the election. None of these functions justifies, much less requires, that the Secretary have absolute discretion to refuse to bring suit where meritorious claims that violations of Title IV rights have affected the outcome of the election.

The words of Section 402(b) impose a positive mandate on the Secretary. He "shall investigate," and if he finds probable cause, "he shall . . . bring a civil action." Throughout the legislative history his responsibility was expressed in mandatory terms. Nowhere in the legislative history is there any suggestion that he could or would refuse to sue where his investigation showed probable cause that violations may have affected the outcome. His discretion was limited to

weighing the evidence and predicting the likelihood of success in the litigation.

The motivating purpose of Title IV was to make union officers responsive to the desires of their members. This purpose is fulfilled only when members who are dissatisfied with union policies and leadership make use of the democratic processes protected by Title IV. But challenging incumbent officers in an election is exceedingly difficult, often costly, and sometimes dangerous. The willingness of dissatisfied members to undertake these burdens and risks depends on their confidence that their rights under Title IV will be protected and that they will be guaranteed a fair and democratic election. Appealing to the Secretary to set aside an unfair election carries added costs and risks. If dissatisfied members, having traveled that long and perilous road, can be told that even though violations of their rights have cheated them of victory, the Secretary has absolute discretion whether to obtain for them a fair election, they will be discouraged from exercising the rights Congress sought to protect, and they will not appeal to the Secretary for protection of those rights. Vitality of the democratic process depends on confidence in the Secretary's decisions. That confidence requires judicial review of his decisions not to sue so members have assurance from a court that his decisions are not arbitrary and are in accordance with law.

ARGUMENT

I

The Secretary of Labor's Refusal to Bring Suit to Set Aside a Challenged Union Election Is Not Immune From Judicial Review to Determine Whether That Refusal Was Arbitrary Or Was Not in Accordance With the Law

The contention of the Secretary, stated simply, is that he has absolute discretion to refuse to bring suit to invalidate a union election even though his own investigation has substantiated that the charged violations of Title IV affected the outcome of that election. The Respondent's complaint alleges:

> "18. Notwithstanding the fact that the Defendant Secretary's investigation has substantiated the plaintiff's allegations and notwithstanding the fact that the irregularities charged affected the outcome of the election, the Defendant Secretary refuses to file suit to set aside the election." (Appendix, P. A5)

The Secretary's position is that even though this is true, the district court has no authority to review his action and he is answerable only through the political process (Petitioner's brief, p. 30). He insists that his action is immune to judicial scrutiny in the face of this Court's clear declaration that—

> "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.: *Abbott Laboratories* v. *Gardner,* 387 U.S. 136, 140.[1]

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[1] See, *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402, 410; K. Davis, ADMINISTRATIVE LAW TREATISE (1970 Supplement) §§ 28.08, 28.16; L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 336, 372 (1965).

There is no substantial reason to believe that Congress intended to give the Secretary absolute discretion to determine whether or not to bring suits to set aside elections conducted in violation of the Act. On the contrary, the nature of the rights to be protected by a suit to set aside an invalid election, the role of the Secretary in bringing such suits, and the limited discretion explicitly recognized by Congress all point in the opposite direction. They all provide persuasive reasons to believe that Congress did not intend to preclude judicial review.

A. *The Nature Of The Rights Protected By The Secretary's Suit To Set Aside An Election*

Protection of the right to free and fair elections is central to the Congressional purpose of insuring the "responsiveness of union officers to the will of their members." S. Rep. No. 187, 86th Cong., 1st Sess. 20 (1959). To guarantee this central right, Title IV protects a wide range of democratic rights—the right to vote and to have votes counted honestly, the right to nominate and to support candidates of one's choice, the right to run for union office and to distribute campaign literature. LMRDA § 401. The exercise of these rights encompasses even more fundamental rights of freedom of speech, freedom of assembly, and the right to participate equally in union affairs guaranteed by Title I.

These rights guaranteed by Title IV are not purely public rights but are individual rights of union members. When the Secretary brings suit to set aside an election, under Section 402, he serves two distinct interests. He protects the "vital public interest in assuring free and democratic union elections," *Wirtz* v.

Local 153, Glass Bottle Blowers Ass'n, 389 U.S. 463, 475 (1968). He also acts on behalf of the individual union member to protect his rights in the union. *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528, 538-9 (1972).

If the Secretary refuses to sue when violations of the Act have affected the outcome of the election, both the public interest in fair and democratic union elections is sacrificed, and the rights of union members to choose their officers and thereby influence the policy and leadership in the union are destroyed. For under Section 403, the exclusive remedy for challenging an election is a suit by the Secretary; after the election has been held, he becomes the sole avenue for protecting and vindicating the rights guaranteed by Title IV. If he refuses to bring suit, both the public interest and the rights of union members go unprotected and unvindicated.

There is no persuasive reason to believe that Congress intended to give the Secretary absolute discretion to sacrifice this central public interest in fair and democratic elections when he deemed it was outweighed by other public interests. There is even less reason to believe that Congress intended to give him unreviewable discretion to ignore and destroy basic democratic rights of individual union members, rights which Congress labored so long and hard to guarantee.

Furthermore, after an election a union member's preexisting rights under state law to enforce the union's constitutional provisions relating to the election can be enforced only through a suit by the Secretary.[8] If the Secretary arbitrarily refuses to bring

[8] Prior to the conduct of an election, existing rights and remedies to enforce the constitutional provisions may be brought by a union

suit, the union member will lose those rights to a fair election which he had before the statute was enacted. This result would be directly contrary to the clear purpose of Congress not to supplant existing rights of union members to a fair election, but to add to those rights and to place on the Secretary the responsibility for enforcing those rights after an election had been conducted.[4]

B. *The Role of the Secretary in Enforcing Rights Guaranteed by Title IV*

The legislative history of Title IV discloses three distinct reasons the Secretary was charged with responsibility for enforcing Title IV rights, and those reasons prescribe the role Congress intended him to play in enforcing those rights. No aspect of his role justifies, much less requires, that he have absolute discretion to determine whether or not to bring suit to set aside a challenged election.

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member in the state courts. Section 403, S. Rep. No. 187, 86th Cong., 1st Sess., 21 (1959).

[4] In discussing the enforcement provisions of what is now Title IV, Senator Wiley and Senator Kennedy engaged in the following colloquy:

> SENATOR WILEY. So I understand that the bill does not attempt to interfere with a member's present rights with relation to a union or union members who may invade his rights, along the lines suggested in the two recent decisions.
>
> SENATOR KENNEDY. The Senator from Wisconsin is entirely correct.
>
> SENATOR WILEY. The bill simply gives additional rights, as I understand——
>
> SENATOR KENNEDY. Yes; that is correct.
>
> SENATOR WILEY. In order that the Secretary of Labor can look after the member's rights in the case of such elections in unions, and in cases of trusteeship, and so forth. Is that correct?
>
> SENATOR KENNEDY. Yes. 104 Cong. Rec. 10947 (1958).

First, the Secretary is to serve as "the union member's lawyer," protecting the rights of union members which they are unable to protect themselves. *Trbovich* v. *United Mine Workers of America, supra,* 404 U.S. at 539.

S.3974, which had enforcement provisions substantially the same as those enacted in Section 402, was reported out of the Senate Committe eon Labor and Public Welfare on June 10, 1958 (S.Rep.No. 1684, 85th Cong., 1st Sess.), and after extensive debate was passed by the Senate on June 17, 1958. During that debate, Senator Kennedy emphasized that the reason for enforcing Title IV rights through suits brought by the Secretary was to provide a more effective remedy than suits by union members in state courts. He cited as a "classic example" the case of members of the Teamsters who brought suit to challenge the election of James Hoffa. After months of litigation, they had to accept a settlement which was highly unsatisfactory, and then were confronted with a lawyer's bill for $300,000. Senator Kennedy then underlined the role of the Secretary in these words:

> "In the bill we provide the right of appeal to the Secretary of Labor, whenever a member believes that his rights, as provided in the bill in the case of an election, have been denied him. Then the Secretary of Labor in effect becomes the union member's lawyer." 104 Cong. Rec. 10947 (1948).

Later in the same colloquy he reemphasized the reason for giving this responsibility to the Secretary:

> "In the case of elections, the Bill gives the Secretary of Labor authority—and we expect him to enforce this Section—to set aside any election in which a member is denied his rights, whereas at

> the present time a member is not given that right, and cannot obtain it and cannot afford to carry a case to the state court." *Ibid.*

S.3974 was defeated in the House, and on January 20, 1959, Senator Kennedy introduced S.505, which contained essentially the same enforcement provisions. In the hearings on S.505, Professor Cox, who was a principal consultant to the draftsmen, described the election enforcement provisions as similar to those to lift improper trusteeships. Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on Labor-Management Reform Legislation, 86th Cong., 1st Sess. 134. In explaining the reasons for placing enforcement of those provisions in the hands of the Secretary, he said:

> "individual workers, for reasons already mentioned, are unwilling or unable to sue an international union. . . . There is ample precedent for authorizing a government agency to bring action for the protection of particular classes of persons unable to protect themselves." Hearings at 132.

When the House Committee on Education and Labor reported out H.R. 8342 (H.Rep.No. 741, 86th Cong., 1st Sess.) it provided for enforcement of Title IV rights through suits by union members. It was sharply criticized by dissenting members of the Committee as lacking "any effective enforcement procedure" because "the individual union member must shoulder the burden of litigation costs himself." H.R.Rep. No. 741, *supra* p. 93.

The role of the Secretary as "the union member's lawyer" precludes any claim of absolute discretion whether to bring suit or not. This role imposes on him

the obligation to protect the member's rights, and limits his discretion to that of a responsible lawyer.

Second, the Secretary is to serve as a screen "to protect unions from frivolous litigation and unnecessary judicial interference in their elections." *Trbovich* v. *United Mine Workers of America, supra,* at 532. By requiring that post-election suits to challenge an election be brought through the Secretary, Congress protected unions from the "unnecessary harassment" of multiple litigation by any union member who was dissatisfied with the outcome of the election and who alleged some technical violation.

The screening function, however, was intended to protect unions only from "frivolous" complaints—those which lacked substance in fact, or which were technical violations not affecting the outcome of the election. The screening function was not intended to shield unions from meritorious complaints of substantial violations. The Secretary must exercise judgment as to whether the claimed violations can be substantiated in court and whether they may have affected the outcome of the election. But the exercise of that judgment does not require nor carry with it the uncontrolled discretion asserted by the Secretary.

The Petitioner contends that to subject the Secretary's refusal to sue to judicial scrutiny would effectively result in exposing the union to multiple and frivolous litigation. This wholly misconceives the proceedings involved. The action is brought against the Secretary, not against the union.[5] The evidence focuses

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[5] The union was joined in the present case because the complaint also alleged that the union had violated its duty to protect the plaintiff's rights under Title IV and had breached its duty of fair representation. App. 6A, paragraph 21.

on what the Secretary has done, not what the union has done. And the question is whether the Secretary has acted arbitrarily or not in accordance with law. Nor will there be multiple litigation, for judicial review of the Secretary's refusal to sue can be accomplished in a single proceeding.

Third, the Secretary's suit serves to consolidate in a single proceeding all meritorious complaints challenging the validity of an election. *Trbovich* v. *United Mine Workers of America, supra,* 404 U.S. at 532. In the words of Professor Cox, "An election is an integer. Its validity should be adjudicated once and for all in one forum." Hearings on S.505, *supra,* p. 135. All complaints concerning the conduct of an election are filed with the Secretary. He consolidates all of the complaints in a single investigation, determines whether the cumulative effect of the substantiated violations may have affected the outcome of the election, and brings a single suit to set the election aside.

The consolidation function of the Secretary does not require, nor is in any way advanced by, absolute discretion in the Secretary to refuse to bring suit. The fact that the Secretary's single suit will enforce multiple rights can in no way justify the Secretary's claim that he has absolute discretion not to enforce those rights. On the contrary, it would seem that when the whole fabric of democratic rights guaranteed by Title IV depends on the Secretary's decision to bring a single suit, that decision should not be immune from judicial scrutiny.

C. *The Mandatory Language And Intent of Congress*

The words of Section 402(b) are not permissive but impose a positive mandate on the Secretary. *Ferry* v. *Udall,* 336 F.2d 706 (C.A.9), certiorari denied, 381 U.S. 904. That section provides that when a union member has properly filed a complaint with the Secretary under Section 402(b)—

> "The Secretary *shall* investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he *shall,* within sixty days after the filing of such complaint bring a civil action . . . to set aside the invalid election. . ." (emphasis supplied).

This mandatory wording stands in contrast to the permissive wording of Section 210, which provides that whenever it appears any person has violated any provision of Title II "the Secretary *may* bring a civil action for such relief . . . as may be appropriate." (emphasis supplied) [6] This suggests that the choice of mandatory rather than permissive words in Section 402(b) was deliberate.

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[6] The wording of Section 402(b) directing that the Secretary "shall . . . bring an action" also stands in contrast with the wording of Section 10(b) of the National Labor Relations Act, which provides that the National Labor Relations Board, with the General Counsel acting on its behalf, "shall have power to issue . . . a complaint." Furthermore, *Vaca* v. *Sipes,* 386 U.S. 171, recognized the intolerability of giving the General Counsel unreviewable discretion to foreclose individual rights. 386 U.S. 182, and denied to the General Counsel control over whether a suit to enforce those rights should be brought. The lower court decisions holding that the General Counsel's refusal to issue a complaint is not reviewable has been sharply criticized. K. Davis, ADMINISTRATIVE LAW TREATISE (1970 Supplement) 969, 982-90; L. Jaffe, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965) 360, 375. The reviewability of the refusal of the General Counsel to act has not yet been ruled on by this Court, *Amal. Ass'n Street, Elect. Ry. & Motor Coach Employees* v. *Lockridge,* 403 U.S. 274, 305, n.2 (Dissenting opinion of Mr. Justice Douglas).

Throughout the legislative history, the Secretary's responsibility under Section 402(b) was described in committee reports and floor debates in mandatory terms, either repeating or paraphrasing the statutory language.[7] Congress did not merely authorize but directed him to bring suit. Congress did not contemplate that he *might* bring suit, but that he *would* bring suit. In the words of Senator Kennedy, "we expect him to enforce this Section." 104 Cong. Rec. 10947.

Congress, of course, did not intend that the Secretary should be an automaton without any scope for exercise of judgment in determining whether to bring suit to set aside an election. First, he is to bring suit "if he finds probable cause to believe a violation has occurred." He has a range of judgment in weighing the evidence and predicting the likelihood of success in litigation. Second, even though violations have occurred, he is not required to bring suit unless he finds probable cause to believe that they "may have affected the outcome of the election" and the election can be set aside under Section 402(c).[8] Again, the Secretary

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[7] "The Secretary is directed to investigate . . ." S. Rep. No. 1684, 85th Cong., 2d Sess., 7 (1958). "The Secretary is to investigate and . . . is to institute a suit." S. Rep. No. 1684, *supra*, p. 37. "The Secretary must investigate complaints . . . he shall . . . institute an action . . ." S .Rep. No. 187, 86th Cong., 1st Sess., 48 (1959). "The Secretary will investigate each such complaint and and . . . he will bring a civil action." Conf. Rep. H.R. No. 1187, 86th Cong., 1st Sess., 35 (1959). "the Secretary must investigate such a complaint . . . he must . . . bring a civil action." Statement of Senator Goldwater, 105 Cong. Rec. 19765.

[8] This exception to the Secretary's obligation to bring suit where violations had occurred was expressly recognized in various committee reports. S. Rep. No. 1684, 85th Cong., 2d Sess., 7 (1958); S. Rep. No. 187, 86th Cong., 1st Sess., 21 (1959).

has a range of judgment in projecting whether the violations he will be able to prove will, in the aggregate, be sufficient to invalidate the election.

Nowhere in the legislative history is there any suggestion that the Secretary was to exercise discretion in bringing suits under Title IV beyond determining whether there was probable cause that violations had occurred and whether those violations may have affected the outcome of the election. There is not the slightest hint that the Secretary could properly refuse to bring suit for other reasons. The consistent purpose of both those who advocated enforcement of Title IV rights through suits by the Secretary and those who sought enforcement through suits by union members was to design the most effective way of insuring these basic democratic rights. See H.Rep.No. 741, *supra,* p. 79. It is beyond belief that either group would have tolerated, much less intended, to give the Secretary unreviewable discretion whether to protect those basic rights or not.

II

Judicial Scrutiny of the Secretary's Refusal to Sue Is Necessary for Title IV to Fulfill Its Purpose

The pervading premise of the Act is that "there should be full and active participation by the rank and file in the affairs of the union." *American Federation of Musicians* v. *Wittstein,* 379 U.S. 171, 183. That full and active participation can be achieved only through democratic procedures and is achieved only to the extent that union members make use of those democratic procedures.

"Title IV's special function in furthering the overall goals of LMRDA is to insure free and democratic

elections," *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n,* 389 U.S. 463, 470. But the ultimate purposes of Title IV are achieved only when union members who are dissatisfied with the policies and leadership of their unions exercise their rights to nominate and support candidates, campaign for union office, distribute campaign literature and encourage members to vote.

The decision of the Secretary whether to bring suit to challenge an election plays a pivotal role in encouraging or discouraging use of these democratic processes. Lack of confidence in the fairness of the Secretary's decision not to bring suit can totally destroy the member's desire to use these processes. An examination of the nature of contested elections will quickly make plain why this is so.

Union election contests, when they occur, are often bitter struggles,[9] particularly in those cases which result in a complaint being filed with the Secretary. Dissatisfied union members do not lightly challenge incumbent officers, for the incumbents have the advantage of control of the union's administrative structure, its official publications, and often its election machinery.[10] The challengers must build a competing organi-

[9] The bitterness of contested elections and the obstacles confronting challengers to incumbent offices in the Steelworkers Union is delineated in Herling, RIGHT TO CHALLENGE (1972). See also Ass'n for Union Democracy, UNION DEMOCRACY IN REVIEW, 1959-72 (1974); F. Cormier and W. Eaton, REUTHER (1970) Ch. 17-18; R. James & E. James, HOFFA AND THE TEAMSTERS: A STUDY OF UNION POWER (1965).

[10] S. Lipset, M. Trow, J. Coleman, UNION DEMOCRACY (1956) Ch. 1; D. Bok and J. Dunop, LABOR AND THE AMERICAN COMMUNITY (1970) 73, 84-5; Summers, *Judicial Regulation of Union Elections,* 70 Yale L.J. 1221, 1226-30 (1961).

zation, collect money for campaign literature and other expenditures, and make themselves known to the other members. The challengers and their supporters may be subject to reprisals ranging from loss of jobs to physical violence. *Union Elections And The LMRDA: Thirteen Years of Use And Abuse,* 81 Yale L.J. 407, 444-8 (1972). Their willingness to undertake these burdens and risks depends in substantial part on their confidence that the rights guaranteed by Title IV will be protected and that they will have a fair and democratic election. Even though defeated, the challengers may hold together their organization with the hopes of doing better in future elections, particularly if their experience gives them confidence that future elections will be fair and democratic.

After an election, defeated candidates are often reluctant to file complaints with the Secretary, even though they believe that their defeat was the result of violations of Title IV. Union members resent another member's resorting to an outside tribunal to resolve internal problems.[11] By filing a complaint he may alienate supporters and invite attacks by those declared elected, thereby reducing his effectiveness in the union's political process. He will appeal to the Secretary only if the prospect of obtaining help outweighs these political risks.[12]

[11] *Union Elections, supra,* p. 483, n. 335; Summers, *Disciplinary Powers of Unions,* 3 Ind. & Lab. Rel. Rev. 483, 503 (1950); *NLRB* v. *Industrial Union of Marine and Shipbuilding Workers,* 391 U.S. 418.

[12] The number of frivolous complaints are relatively small. In two-thirds of all complaint cases the Department finds that it has jurisdiction and that violations have occurred, and in more than forty percent of the cases finds that those violations may have affected the outcome of the election. U. S. DEPT. OF LABOR, UNION

If the Secretary obtains voluntary compliance with a supervised rerun,[13] or brings suit to set aside the election, the challenger will recoup much or all the political cost of filing the complaint. The action of the Secretary legitimizes his contentions that democratic rights have been violated and enables him to hold his support among the membership. If the case is brought to trial, the nature and scale of violations will be revealed, responsibility for those violations will be established, and their repetition will be discouraged. Even though the suit does not succeed, the voting strength of the candidates will be more reliably measured and continued engagement in the political process encouraged.

If the Secretary refuses to bring suit, the political future of the challenger is inevitably damaged, but if the Secretary's refusal is seen by the union members as justified, it will not discourage them from future participation in the union's political life, or deter them from running for office or supporting opposition candidates when they believe they can win in a fair and democratic election.

However, if union members believe that the Secretary's refusal to sue is not justified, then the political

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ELECTION CASES UNDER THE LMRDA, 1966-70, p. 6. Many complaints are dismissed on jurisdictional grounds so the number in which there is a finding that no violations have occurred is slightly more than two percent. *Union Elections and the LMRDA: Thirteen Years of Use and Abuse*, 81 Yale L.J. 407, 571 (1972).

[13] The Secretary may use the threat of a suit to induce voluntary union compliance and correction. Settlements take the form of Formal Determinations which normally entail a voluntary rerun of the election under the supervision of the Labor Department. *Union Elections, supra*, p. 492-6.

process is permanently blighted. Struggles to unseat incumbent officers are seen as quixotic when there is no guarantee of a fair election; and criticism of union officers loses its purpose when a majority cannot remove them. Appealing to the Secretary for protection of democratic rights is seen as carrying more risks than prospects of protection.

The critical requirement is confidence in the Secretary's decision. It is not enough that his decision be justified, it must be seen as being justified. Confidence in the Secretary's decision is undermined by three factors:

First, the decision whether to sue is made in a meeting in which the complainant cannot participate and is based on investigative reports which he has not seen and which he cannot supplement.[14] He does not know the considerations weighed nor have a voice in the decision.

Second, the complainant is never more than cursorily informed of the reason for the decision not to sue. At most, the letter notifying him of the decision will list the violations found with the conclusory statement that "there is not probable cause to believe that the violations found may have affected the election outcome." But half of the letters are not even this revealing, merely stating that the case "is not suitable for litigation," without indicating what, if any, violations

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[14] The decision is made jointly by the Solicitor of Labor and the Assistant Secretary of Labor-Management Relations based on recommendations submitted by area and regional offices. *Union Elections, supra*, p. 497.

were found or what made the case "not suitable for litigation."

Third, there is a common perception among complainants that political influence is brought to bear to forestall litigation, and that there is a systematic bias in favor of incumbents because the Department depends upon good relations with union officials to deal with them on other matters.[15] This perception is enhanced by the belief that the two officials who make the decision, the Solicitor of Labor and the Assistant Secretary for Labor-Management Relations are particularly susceptible to influence by union officials.[16]

The lack of confidence growing from these three factors is confirmed and hardened by the Secretary's adamant insistence that his decision not to sue is immune from judicial scrutiny. From the perspective of union members, why should the Secretary be unwilling to justify his decision if he has good reasons for that decisions? Why does he resist an inquiry by the court into whether his decisions is arbitrary or not in accordance with law? What is it that he is afraid to disclose? What is it that he is afraid he cannot justify? Again from the perspective of union members, how can an official be relied upon to protect their rights

[15] *Union Elections, supra,* p. 797-8. The number of letters using the "affected the outcome" formula and the number using the "not suitable for litigation" formula are shown in Appendix B, p. 571.

[16] *Union Elections, supra,* p. 499-500. This perception is shared by both attorneys for Title IV complainants and union counsel, and by some regional staff members of the Department of Labor. *Id.* n. 418.

[17] D. Bok and J. Dunlop, LABOR AND THE AMERICAN COMMUNITY, 406-8 (1970).

when he insists that he is accountable to no one when he refuses to protect those rights?

To fulfill the purposes of Title IV of encouraging the exercise of democratic rights, those who appeal to the Secretary to protect those rights must have confidence in his decisions. It is not enough that the Secretary's decisions not to sue can be justified; there must be confidence in union members that they are justified. Confidence in his decisions can be established only if they are subject to judicial scrutiny, and union members can obtain from a court assurance that his refusal to proceed on their behalf is not arbitrary and is in accordance with law.

CONCLUSION

The simple question presented here is whether the Secretary, charged by Congress with protecting basic democratic rights of union members and guaranteeing to union members and the public fair and democratic elections, has unreviewable discretion to refuse to protect those rights. The Secretary asserts he has this uncontrolled power; that he can deny union members enforcement of their statutory rights and be answerable in no court of law. Our history demonstrates that no official, high or petty, can be safely entrusted with such power, and the path of the law has been toward making officials accountable for their actions. Congress, in making the Secretary's suit the exclusive remedy for protecting Title IV rights, did not act contrary to that wisdom and the course of the law. Congress expected the courts to assure union members and the public that the Secretary in refusing to sue acted reasonably and not arbitrarily, that he acted within the law and not beyond the law.

Respectfully submitted,

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